United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1228

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

-against-

BENJAMIN SCHWARTZBERG,

Defendant-Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

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APPELLANT'S APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

UNITED STATES OF AMERICA

-AGAINST- 71 CR 500

BENJAMIN SCHWARTZBERG,

DEFENDANT.
X

PHOTOCOPY OF DOCKET ENTRIES

SUPERSEDING INDICTMENT FILED (5/19/71)

GOVT'S NOTICE OF READINESS FOR TRIAL FILED (5/19/71).

ORDER FILED THAT CASE BE PRE-TRIED ON 6/3/73) (4/23/73)

NOTICE OF APPEARANCE FILED (5/3/73)

GOVT'S TRIAL BRIEF AND MEMO OF LAW FILED CONCERNING ON THE SCENE IDENTIFICATION (9/17/73)

2 ORDERS OF SUSTENANCE FILED (9/21/73)

JUDGMENT AND COMMITMENT AND ORDER OF PROBATION FILED (1/18/74)

NOTICE OF APPEAL FILED (1/28/74)

CLERK'S CERTIFICATE

DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

UNITED STATES OF AMERICA

-AGAINST-

BENJAMIN SCHWARTZBERG,

DEFENDANT.

X

ATTORNEYS FOR U.S.:

ATTORNEYS FOR DEFENDANT: NATHAN KESTUBAUM, 51 EAST 42 STREET, NEW YORK, NEW YORK, (212) 661-2448

DID DELAY COMMERCE BY MEANS OF EXTORTION, ETC.

FINED $10,000.00

5/19/71 - BEFORE WEINSTEIN J - SUPERSEDING INDICTMENT FILED.

6/3/71 - BEFORE WEINSTEIN, J. - CASE CALLED - DEFENDANT & COUNSEL PRESENT - DEFENDANT ARRAIGNED AND ENTERS A PLEA OF NOT GUILTY - BAIL $15,000 CONTINUED.

1/28/72 - BEFORE ROSLING, J. - CASE CALLED - MARKED READY ON 24 HOURS NOTICE - NOTICE BE GIVEN AFTER FEB. 18, 1972 AT 10 A.M.

3/21/72 - GOVT'S NOTICE OF READINESS FOR TRIAL FILED.

3/27/72 - BEFORE ROSLING J - CASE CALLED - MARKED READY ON 24 HOURS NOTICE

12/11/72 - BEFORE ROSLING J - CASE CALLED - DEFENDANT AND HIS ATTORNEY PRESENT - CASE MARKED READY AND PASSED.

12/12/72 - BEFORE ROSLING, J - CASE CALLED - NO APPEARANCE ON BEHALF OF THE PLAINTIFF AND THE DEFENDANT -

NONE REQUIRED - CASE MARKED READY AND PASSED.

12/13/72 - BEFORE ROSLING J - CASE CALLED - ADJOURNED TO 12/14/72

12/14/72 - BEFORE ROSLING J - CASE CALLED. DEFENDANT AND PLAINTIFF NOT PRESENT. NONE REQUIRED AS STATED BY THE COURT. CASE MARKED READY AND PASSED. ADJOURNED TO DECEMBER 18, 1972, AT 10 A.M.

12/18/72 - BEFORE ROSLING J - CASE CALLED - DEFENDANT NOT PRESENT - ADJOURNED TO 12/19/72.

12/19/72 - BEFORE ROSLING J - CASE CALLED - MARKED READY AND PASSED - ADJOURNED TO 12/26/72 AT 10:00 A.M.

12/26/72 - BEFORE ROSLING J - CASE CALLED - ADJOURNED TO 1/5/73 AT 10:00 A.M.

4/23/73 - BY WEINSTEIN, J - ORDER FILED, THAT THIS CASE BE PRE-TRIED ON 5/3/73

5/3/73 - NOTICE OF APPEARANCE FILED.

5/3/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL PRESENT - PRE TRIAL CONFERENCE HELD AND CONCLUDED - TRIAL SET FOR SEPTEMBER 17, 1973 AT 10:00 A.M.

9/17/73 - GOVT'S TRIAL BRIEF FILED, AND MEMORANDUM OF ALW CONCERNING ON THE SCENE IDENTIFICATION FILED.

9/17/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL NATHAN KESTENBAUM PRESENT - DEFENDANTS MOTION TO SUPPRESS - HEARING ORDERED AND BEGUN - HEARING CONCLUDED - DEFENDANTS MOTION TO SUPPRESS IS DENIED - TRIAL ORDERED AND BEGUN - JURORS SELECTED AND SWORN - TRIAL CONTINUED TO 9/18/73 AT 10:45 A.M.

9/18/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL PRESENT - TRIAL RESUMED. TRIAL CONTINUED TO 9/19/73.

9/19/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL PRESENT - TRIAL RESUMED - TRIAL CONTINUED TO SEPTEMBER 20, 1973.

9/20/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL PRESENT - TRIAL RESUMED - TRIAL CONTINUED TO SEPTEMBER 21, 1973, AT 11:00 A.M.

9/21/73 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL PRESENT - TRIAL RESUMED - JURY RETURES FOR DELIBERATION AT 3:15 P.M. - JURY RETURNS AND RENDERS A VERDICT OF GUILTY AS CHARGED - JURY EXCUSED - ALL MOTIONS DEFERRED TO DATE OF SENTENCE - SENTENCE ADJOURNED WITHOUT DATE - BAIL CONTINUED.

9/21/73 - BY WEINSTEIN J - 2 ORDERS OF SUSTENANCE FILED.

1/18/74 - BEFORE WEINSTEIN J - CASE CALLED - DEFENDANT AND COUNSEL NATHAN KESTENBAUM PRESENT - DEFENDANT'S MOTION TO SET ASIDE THE VERDICT ARGUED AND DENIED - CONFIDENTIAL SENTENCING MATERIAL ORDERED SEALED - MARKED AST COURT EX#2 AND PLACED IN THE VAULT OF THE CLERKS OFFICE. DEFENDANT SENTENCED TO 10 YEARS IMPRISONMENT PURSUANT TO T-18, U.S.C. SEC. 3651 - DEFENDANT TO SERVE 6 MONTHS AND EXECUTION OF THE REMAINDER OF THE SENTENCE IS SUSPENDED AND THE DEFENDANT IS PLACED ON PROBATION FOR 5 YEARS AND FINED $10,000 ON COUNT 1. SPECIAL CONDITION OF PROBATION - DEFENDANT TO CUT OFF HIS CONNECTION

WITH UNION AS ORGANIZER - STAY OF EXECUTION OF SENTENCE IS GRANTED PENDING APPEAL.

1/18/74 - JUDGMENT AND COMMITMENT AND ORDER OF PROBATION FILED - CERTIFIED COPIES TO MARSHAL AND PROBATION.

1/28/74 - NOTICE OF APPEAL FILED.

1/28/74 - DOCKET ENTRIES AND DUPLICATE OF NOTICE OF APPEAL MAILED TO THE C OF A (WITH FORM A)

2/6/74 - ORDER RECEIVED FROM THE COURT OF APPEALS THAT THE INDEX TO RECORD BE DOCKETED ON OR BEFORE FEBRUARY 19, 1974.

SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

UNITED STATES OF AMERICA

-AGAINST-

BENJAMIN SCHWARTZBERG,

DEFENDANT.
X

THE GRAND JURY CHARGES:

COUNT ONE

1. AT ALL TIMES HEREINAFTER MENTIONED, 21-44 FOOD CORP., INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK, LOCATED AT 21-44 UTOPIA PARKWAY, WHITESTONE, QUEENS, WITHIN THE EASTERN DISTRICT OF NEW YORK, OPERATED A BUSINESS THROUGH ITS CORPORATE OFFICERS, AND IN THE CORPORATION OF THE SAID BUSINESS, THE SAID CORPORATION THROUGH ITS CORPORATE OFFICERS AND EMPLOYEES ORDERED AND PURCHASED INGREDIENTS, SUCH AS FLOUR, SALT, MALT, AND YEAST FOR THE MANUFACTURE OF BAGELS, WHICH INGREDIENTS MOVED IN INTERSTATE COMMERCE FROM VARIOUS LOCATIONS IN THE STATE OF NEW JERSEY, AS WELL AS FROM VARIOUS LOCATIONS IN THE STATES OF THESE UNITED STATES TO THE EASTERN DISTRICT OF NEW YORK.

THAT BETWEEN ON OR ABOUT THE 10TH DAY OF JULY 1970, AND ON OR ABOUT THE 1ST DAY OF AUGUST 1970, THE EXACT DATES BEING UNKNOWN TO THE GRAND JURY, WITHIN THE EASTERN DISTRICT OF NEW YORK, THE DEFENDANT BENJAMIN SCHWARTZBERG DID UNLAWFULLY OBSTRUCT, DELAY AND AFFECT COMMERCE, AS THAT TERM IS DEFINED

IN SECTION 1951 OF TITLE 18, UNITED STATES CODE, AND THE MOVEMENT OF ARTICLES AND COMMODITIES IN SUCH COMMERCE, BY EXTORTION, AS THAT TERM IS DEFINED IN SECTION 1951, TITLE 18, UNITED STATES CODE, THAT IS TO SAY, THE DEFENDANT BENJAMIN SCHWARTZBERG OBTAINED PROPERTY RIGHTS, INCLUDING THE RIGHT TO CONDUCT A BUSINESS, FROM THE 21-44 FOOD CORP., BY THE WRONGFUL USE OF ACTUAL AND THREATENED FORCE, VIOLENCE AND FEAR AGAINST THE 21-44 FOOD CORP., ITS OFFICERS, EMPLOYEES AND CUSTOMERS.

A TRUE BILL

_____

FOREMAN

_____

UNITED STATES ATTORNEY

THE COURT: Now, ladies and gentlemen: You are going to hear the openings. These are just brief statements of what the attorneys believe the evidence will show, it is not itself evidence.

Proceed, gentlemen.

MR. SHANLEY: Shall I proceed, your Honor?

THE COURT: Yes.

(Mr. Shanley opened to the jury in behalf of the Government as follows:)

MR. SHANLEY: Mr. Kestnbaum, Mr. Foreman, ladies and gentlemen:

As the Court has already pointed out to you, my name is Richard L. Shanley, and please excuse my voice, I've got a little cold and if you can't hear me, make an indication and I'll try to speak louder.

I'm going to spend the next few minutes with you giving to you an opening statement. The opening statement is just what it is: opening statement. It's an outline of what the Government expects to prove in the course of this trial. It's basically to enable you to follow the trial more coherently and to

understand, perhaps remember and keep in mind what I said so that you will follow the witnesses when they come on the stand, you will have some idea. It wouldn't be a complete surprise as to what the testimony will be.

My statements now are not evidence, by the way, simply what I say. What Mr. Kestnbaum says when he makes his opening statement, that's not evidence either.

Now, in this case, the defendant has been indicted, charged by a Grand Jury. And the Court read to you part of the indictment. I'm going to read to you again the pertinent parts of the indictment so you know what he was charged with.

It's a one-count indictment, one charge:

"Between on or about the 10th day of July, 1970, to on or about the 1st day of August, 1970, the exact dates being unknown to the Grand Jury, and within the Eastern District, the defendant, Benjamin Schwartzberg, did unlawfully obstruct, delay, and affect interstate commerce, by extortion, that is to say,

the defendant, Benjamin Schwartzberg, obtained property rights, including the right to conduct a business from 21-44 Food Corporation, by the wrongful use of actual and threatened force."

The indictment has other language in it, but basically, that's the charge, a charge of extortion.

And the Government is going to have a number of witnesses, and I will not preface my synopsis of it, of the witnesses' testimony, by identifying all the witnesses by name. I'll just try to give you what the whole picture will be when they testify.

Now, 21-44 Food Corporation was the store located in Whitestone, Queens. My geography may not be exact. It was in Queens. It was on Utopia Parkway, and this store was opened in early January, 1970, and they made bagels.

The owners -- Phil Reicher was the operating man in the store. He was one of three or four owners and they made bagels on the premises and they delivered them to accounts located in Long Island and Queens and up in

the Bronx also, and they started late '69, early 1970.

The defendant, Benjamin Schwartzberg, had his own business, Star of David Bagel Corporation, and that business was to also manufacture bagels and to sell them to various accounts.

Now, you'll hear the testimony from Mr. Reicher for one. He worked at his 21-44 Food Corporation every day. He came in early and stayed late.

Other employees will testify about working at 21-44, the hours that they spent working.

This was a new business and they were starting. They were all young and energetic and enthusiastic and the business, as new businesses go, was progressing.

They solicited accounts, they got new accounts and they were building their business.

Now, Mr. Reicher had been warned by other persons "Don't do certain things. Don't compete with Mr. Schwartzberg," because if he

competes with Mr. Schwartzberg, something might happen.

But Mr. Reicher continued. He was going to make his business and he was going to make a go out of it.

As the summer, into the early summer, 21-44 Food Corporation obtained certain accounts: Waldbaum's account, you know the supermarket Waldbaum's, they have stores all over the Queens, out in Long Island, and the Bronx. They obtained these accounts. Some of these accounts had been previously serviced by Mr. Schwartzberg.

In the early part of the summer, late June, early July, Mr. Phil Reicher was confronted by Mr. Schwartzberg. And they had a conversation in which Mr. Reicher said words to the effect that business is business.

At that time, Mr. Schwartzberg threatened him. Mr. Reicher knew what it was all about because he had heard of Mr. Schwartzberg's reputation. He knew. However, they continued to solicit these new -- not solicit; service these new accounts, these

Waldbaum accounts. Things started to happen. Little incidents occurred in this 21-44 Bagel Stop. Windows were broken. Other things happened.

However, Mr. Reicher, although feeling uneasy, he and his partners feeling uneasy, continued in the business. And eventually, one morning, early morning in July, mid-July of 1970, the delivery truck, the bagel delivery truck, a little International van in which they delivered their bagels, was parked outside the Bagel Stop, the premises. And one early morning in mid-July, the defendant attempted to set fire to that truck. He was seen by an employee of the 21-44 Food Corporation, or a former employee, but a person. She was actually a former employee. She had been working for them.

He was seen, the firemen came, they put out the fire -- the policemen put out the fire first, and the firemen came.

Based on her description, police, that very night, went out, found Mr. Schwartzberg driving his car, a short vicinity away, brought

him back. She identified him.

Mr. Schwartzberg was then brought down to the police station and booked and a complaint was drawn up against him at that time.

Now, this truck was then unservicable after that. It was impounded by the police as evidence. The owners, Mr. Reicher and Mr. Steinberg, and others, they decided that the danger was too great for them. They didn't know what was going to happen next. They were afraid for their lives. They were scared, and you'll hear this testimony from these witnesses.

Eventually, their fear plus the fact that they didn't have the truck any more, they couldn't make their deliveries the way they had in the past. Eventually, they decided we better get out. And they got out. They closed their doors. The end of July, they were no longer in the bagel manufacturing and delivery business.

When I say bagel delivery business, the delivery and sale to wholesale accounts

like Waldbaum's. They quit. They gave up. And that's in a nutshell, ladies and gentlemen, the testimony that you will hear in the next day or so.

At the end, after you have heard all the evidence, I'll get another opportunity to speak to you, perhaps highlight points of evidence for you. And I'm confident, ladies and gentlemen, that the evidence that you hear will prove beyond a reasonable doubt, prove to your satisfaction, that the defendant did in fact commit the crime which is alleged in this indictment. And thank you for your kind attention.

(Mr. Kestnbaum opened to the jury in behalf of the defendant as follows:)

MR. KESTNBAUM: May it please the Court, Mr. Shanley, Mr. Foreman, ladies and gentlemen of the jury:

My name is Nathan Kestnbaum. The only distinction of that name is that practically nobody ever spells it right. I'm the attorney for the defendant.

My learned adversary has given a state

of facts and that he, you might say, he's stuck with it. That's what he's got to try to prove to you.

I expect that when the evidence is in, you will readily perceive that the facts are entirely different.

This bagel company, 21-44, or whatever it may be called, was in difficulties, financial difficulties. Their checks were bouncing, they didn't pay anyone.

They were -- it was a going firm, as Mr. Shanley said, but he didn't use the word in the right way. It was going very fast, out of business.

And you will note from his own opening statement, with reference to this truck and you'll hear much about it later, that the truck was impounded by the police.

And I think the evidence is going to show you that they were desperately in debt and default with respect to payments on the truck and everything else.

And Mr. Schwartzberg had as much to do with them going out of business as the man

in the moon. It was an unprofitable venture. They were not go-getters. This is a free market. They had a right to take business from competitors and from Mr. Schwartzberg's firm or from anyone else they could. But they fell as a result of their own efforts.

At the time when they were going under, it would have seemed to them to have been a splendid idea to blame it on a competitor and, incidentally, the proof will establish to you that this Mr. Reicher, who you heard about, was a former employee, with a very satisfactory relationship with Mr. Schwartzberg, the defendant.

The facts are not as the Government has stated, and the proof will develop it. Even though I might remind you that I don't have to prove anything at all, the defendant doesn't have to prove anything. He can remain with lips sealed from the beginning of this trial to the very end.

It is incumbent upon the Government to prove guilt beyond a reasonable doubt, and

the defendant sits there protected with one of the strongest presumptions known to the law: the presumption of innocence.

I am satisfied without any question that after you listen to the evidence, with an open mind, that's all I ask, and give this defendant the fair trial that he's entitled to, you will readily conclude that in fact he's not guilty of the accusations that have been leveled against him.

Thank you.

THE COURT: Call your first witness, please.

MR. SHANLEY: Government calls as its first witness Miss Patricia Guze.

P A T R I C I A G U Z E, called as a witness in behalf of the Government, being first duly sworn by the Clerk of the court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Patricia Guze.

THE CLERK: Spell your last name.

THE WITNESS: G-u-z-e.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q How old are you, Miss Guze?

A Twenty-one.

Q Are you married?

A No.

Q And what's your occupation?

A Right now I work for the Sickle cell Anemia Foundation, and I'm going to go to nursing school tomorrow.

Q You're registering for nursing school?

A Right.

Q Now, directing your attention to 1970 and in particular the first half of the year 1970, by whom were you employed?

A The Bagel Stop.

Q Where are they located?

A 21-44 Utopia Parkway.

Q What were you doing there?

A I was working as a cashier, sales girl.

Q And do you know the principals of that organization?

A Yes.

Q Who are they?

A Mr. Steven Levy, Philip Reicher, Eugene Steinberg, and Charles Naer.

Q When you were -- you were a countergirl; is that right?

A Yes.

Q And was the Bagel Stop -- withdrawn.

Did there come a time when you quit?

A Yes, that was in June of 1970.

Q When did you start, do you recall?

A January, 1970.

Q Now, where was that store located?

A Between Twenty-first Road and Twenty-second Avenue on Utopia Parkway.

Q Did they have a facility to make things in the store?

A Yes, they made bagels and bialys.

Q In the back of the store?

A Yes.

Q Now, Miss Guze, did there come a time in 1970 that you spent the night at the store at 21-44 Utopia Parkway?

A I had attempted to spend the night at the store.

Q Do you recall the month that this took place?

A It was July 17th.

Q Now, the evening before, what time did you get to the Bagel Stop?

A I got there about 6 o'clock in the evening.

Q This was at what address, again?

A 21-44 Utopia.

Q And after you were there, did you observe anybody there, at that time?

A Yes. Well, I had a friend that worked there. So I talked with them for a while.

Q Who are your friends, if you recall?

A Diane Regan and the other people, I really don't remember. I haven't been in touch with them a long time. I don't remember their names. And Darryl Steinberg.

Q In that store, was there a place where you could sleep?

A In the back, there was a place where the boss used to lie down a lot, because they used to do baking for heavy orders. There was a cot.

Q Was there any particular reason why you were going over there to stay that night?

A Yes, I had an argument with my parents, and I was going to ask when I got there if I could stay there.

Q Did you ultimately get permission to stay there?

A Yes, Darryl called Phil at home and Phil gave him permission.

Q Now, what street does the store face on?

A It faces Utopia Parkway.

Q And as you look out the street, what direction is to your right from the store, you're looking out from the store to the street?

A Right, to my right is Twenty-second Avenue.

Q Well, I'm talking about Utopia Parkway, which direction does that run, to your right?

A South.

Q To your left, which direction is it?

A North.

Q Now, the front of the store, what material is it made of, or was it made of?

A The whole front is glass windows.

Q And how about the door?

A Glass.

Q On that particular evening in July, were the windows intact?

A No, there were a couple of holes. I would say

about five or six, made from somebody throwing rocks through them consecutively that week, every night.

Q Now, was this the first time you had seen holes in the window?

A That week, yes. That week was the first time I saw holes in the window.

Q Before that day, had you seen holes in the window?

A Yes, the whole week before that.

Q Well, were the holes the same holes that you saw that night?

A Yes.

Q Now, was there a sidewalk in front of the store?

A Yes, there was.

Q Now, there came a -- withdrawn. Were there any street lamps outside?

A Yes, going onto the street, there are lights from the store, night lights. There were street lights in the street, and there were freezer lights in the store. So it was very well lit.

Q Now, as best you can recall, when was the last person who you were with in the store that night? What time did they leave?

A That was 12:30 and it was Darryl Steinberg.

Q Now, what did he do, if anything, when he left?

A First he called Phil, got permission for me to stay there, and then he locked me in the store.

Q Now, could you open the door from the inside?

A No, I couldn't.

Q Was there any other way out of the store?

A No. All the doors were locked from the outside.

Q Then what did you do after Mr. Darryl Steinberg left?

A Well, it was about 12:30, twenty-five to one. And right before I was going to go to sleep, I decided to look out the window just to make sure nobody was around because I was just a little edgy about staying overnight, and just then a gray Cadillac pulled up and a man in a white baker's uniform got out.

Q You say he pulled up. Where did he pull up?

A He pulled up left center of the store.

Q On your -- on the store side of the street?

A Right.

Q Was there anything in front of that?

A Yes, then a little to the right was the bakery truck.

Q There was a vehicle parked there?

A Right.

Q After you observed the car pull up, what happened then?

A Then the man got out and he just walked up and down the block looking at the bakery from all different angles and that was for about five minutes and then he got back in his car and pulled away.

Q Did you observe this man at that time?

A Yes, I did.

Q Did you get a look at his face?

A Yes, I did.

Q Did you get a look at him from the side or from the front?

A Well, I guess from all different angles, because he was turning and looking in different angles, so I saw him fully.

Q This was directly out in front of the window?

A Right.

Q Or directly, it was -- there was nothing in between you and him?

A No, nothing obstructing the view.

Q Now, you say there was a truck parked there, what was that truck?

A That's the delivery truck. It's a step-van.

Q And that -- excuse me. Now, how long did you observe this man at that time when he was looking around?

A The first time, that was for five minutes, approximately.

Q And what did you observe about him, did you observe the color of his hair?

A Yes, he was about five-eleven, pepper-and-salt color hair, and he was in a white baker's uniform.

Q Can you approximate his age?

A About fifty-five.

Q What was your reaction to this?

A Well, at first I didn't think anything of it.

MR. KESTNBAUM: Your Honor, I object.

THE COURT: Sustained.

Q What did he do then?

A He got back in his car and he left.

Q What kind of a car was it?

A A gray Cadillac.

Q Now, with regard to the store itself,

what lights were on inside the store at that time?

A The freezer lights and the night lights.

Q Do you think he could see you in there?

A No, I was in the dark.

MR. KESTNBAUM: I object to what she thought, your Honor.

THE COURT: Sustained.

Q Now, while you were observing this man outside, could you see -- how many vehicles could you see from your vantage point at that time?

A Just two.

Q What happened then, if anything?

A Well, he got --

Q You testified that he got back in his car and he drove away?

A Right, and then I figure that that was the end of him, so I just looked out the window again, but I saw the car driving by the store. So then I waited a few minutes and I figured, you know, if you doesn't come back, then I'll just go to sleep.

But I looked and he was passing again.

Q Did there come a time --

A Yes, and then --

Q -- when you saw him across the street?

A Then the car pulled up on the other side of the boulevard and he got out and he was doing the same thing from the other side of the boulevard, you know, looking at the bakery from all different angles.

Q Did you see his face over there?

A Yes, it was the same man.

Q Could you see the car?

A Same car.

Q And what was he doing, describe as best you can recall what he was doing?

A He was sort of like stooping, you know.

Q What direction was he looking in?

A To the bakery.

MR. KESTNBAUM: Your Honor, I object. She said he was stooping.

THE COURT: Yes, sustained.

Q He was stooping, and did there come a time when he looked in any direction?

MR. KESTNBAUM: Your Honor, I object to counsel leading the witness.

THE COURT: Yes, please don't lead.

Q What else did you observe him doing besides stooping?

A Well, all I could say is that he was just walking

a few feet to each side, bending, stooping, and looking at the surrounding of the bakery from all different angles.

Q Now, how long did you observe him this time?

A He was there again for about five, six, seven minutes.

Q And what clothes, if anything, did you see him wearing?

A This same uniform, the white baker's uniform.

Q Now, can you approximate how far away, when you saw him across the street, can you approximate, perhaps using relative objects in this courtroom, how far away he was across the street when you saw him?

A He was further back than the back wall.

MR. KESTNBAUM: Indicating, your Honor, a distance of about fifty feet, for the record.

THE COURT: Yes, just about fifty feet.

Q Now, when you observed him across the street, how close was he to the street on the other side?

A How close was he?

Q Was he on the street or on the sidewalk?

A He was on the sidewalk.

Q What did you do, if anything, then when you

saw him across the street?

A Well, at that time that's when I started really getting nervous, so I went and stood in the back of the store and I waited to see what was going to happen next. That's when I saw him circling about five times in front of the store.

Q What did you see?

A I saw him past the bakery and I would wait a few minutes and he would pass again, he was more or less circling, I guess.

Q How fast was he going?

A Pretty slow speed.

Q What was the vehicle you saw circling?

A The gray Cadillac.

Q What were the wather conditions that night, Miss Guze?

A It was summer and it was a warm nice night.

Q Was it raining?

A No.

Q Now, how many occupants of that car could you see at that time, if you can?

A I could, there was one.

Q Now, describe how this vehicle travelled around, if you can. You may use your hands.

A Well, he would pass the baker, going towards the right and then I saw, I like stooped over this way and I saw that he was making a turn and I came back and I waited and then I would see him pass in front of me again and he would come around. That's why I'm pretty sure he was circling, because he was coming from the same direction each time.

Q You saw him coming from the same direction?

A Right.

Q At intervals?

A Yes.

Q To your knowledge, how many other cars did you see, if any?

A I saw very little traffic that night. There weren't many cars.

Q What time was this about now?

A This time, I would say about five to one, ten to one.

Q In the morning?

A Right.

Q You didn't look at your watch?

A No, but I know from how long everything took.

Q Now, did there come a time when you -- there was a telephone rang?

A Right. I asked my girlfriend, Diane --

Q Did the telephone ring?

A Yes.

Q Did you pick it up?

A Yes.

Q Did you have a conversation?

A Yes.

Q And who was the person at the other end?

A Diane Regan.

Q Where did she live?

A She lived on Twenty-first Road and 166th Street. It's adjacent to the bakery.

Q Well, now, could you enlighten the Court and jury as to where she lived? "Adjacent" is sort of an ambiguous word. With regard to Utopia Parkway, where did she live?

A Well, north of the store is Twenty-first Road and she lived right up that street. That's on the left-hand side of the bakery looking out.

Q So if you walked out the door of Bagel Stop and you wanted to walk to her house, how would you go?

A You would make a left at the door and you would make a left at the corner. Then there's a half block,

and then there's another full block and she's half way up on that block, not even half way, about a fourth of the way up.

Q Now, you had a conversation with this young lady; is that correct?

A Right.

Q And what was your state of mind at this time?

MR. KESTNBAUM: Objection, if the Court please.

THE COURT: Sustained.

MR. SHANLEY: Your Honor, this is -- the witness has testified that she's getting quite frightened and I think that --

MR. KESTNBAUM: She hasn't, your Honor. I object to that statement before the jury.

MR. SHANLEY: -- and the statements that she makes at this time would be well called excited utterances or res gestae, and I think these are spontaneous statements which the new rules of evidence, I think, call for their admissibility.

THE COURT: No, I'll sustain the objection.

MR. KESTNBAUM: If your Honor please, I

think it's also too early to sum up in this case.

THE COURT: Proceed.

MR. SHANLEY: I didn't hear your Honor's ruling, I'm sorry.

THE COURT: I said I sustain the objection.

BY MR. SHANLEY:

Q Now, you had a conversation with Diane; is that right?

A Right.

Q And from your conversation with Diane, what did you learn?

MR. KESTNBAUM: Your Honor, I object.

THE COURT: Sustained.

MR. SHANLEY: Your Honor, I fail to see -- perhaps it's my own inadequacy here, I'm trying to establish the conversation that took place between Diane and Miss Guze and --

THE COURT: I don't think it's possible for you to obtain that information from this witness. That's hearsay. The observation of the person on the other side can come from her, not from this witness. It's hearsay, as far as this witness is concerned. This witness can only tell

us what she observed.

MR. SHANLEY: Could she tell us what she said?

THE COURT: No, it's a form of hearsay.

MR. SHANLEY: Your Honor, I would respectfully urge that this would be an exception to the hearsay rule, as an excited utterance.

THE COURT: No. She doesn't seem to me to have been that excited at that point.

Go ahead.

BY MR. SHANLEY:

Q Miss Guze, you testified that you saw the car going around more than one occasion. Do you recall how many times the car drove by, if possible?

A I saw it about four times.

Q Well, did there come a time when you saw this vehicle come to a stop?

A Yes. Then he pulled up again, behind the bakery truck, this time a little bit further back, and at this point I was still on the phone with Diane, and I had turned away for a second, and I told Diane that I was going to call the police, so I wasn't looking out now.

She said, "Before you call the police, just

look on it once more --"

Q The Court has made a ruling that you can't testify as to what you said to her and what she said to you. Just what did you observe when this car pulled up?

A Just then, I turned around and looked, and this same man was in the back of the truck, squatting down, and with his hands in the area of the gas tank. I couldn't tell exactly what he was doing, but his hands were doing something. And I said, "That is --" I hung up the telephone and I called the police.

Q What did you watch --

A No, I just then I had, when he was leaving, he dashed to his car and there was flames shooting out of the back of the truck.

Q What car did he get into?

A He got back in the Cadillac and he drove away real fast.

Q What did this man have on at that time?

A White baker's uniform.

Q Was this the man you had seen previously?

A Yes.

Q So, what did you see emanating from the truck?

A Flames shooting out of the gas tank.

Q So what did you do then?

A Then I had called the police and I was afraid because there was all glass in the front of the store.

MR. KESTNBAUM: I object to whether she was afraid or what --

MR. SHANLEY: Your Honor, I think we have reached a stage now where the witness is entitled to explain to the Court and jury her state of mind.

THE COURT: I don't think her state of mind is particularly relevant at this stage.

Go ahead.

Q What did you do, Miss Guze?

A I ran to the back of the store so I wouldn't be near the glass. That's after calling the police.

Q You called the police. And where did you stay after that?

A Then I stayed in the back of the store until I heard the police banging on the window.

Q Then what happened?

A Then I went to the window and I talked to them through one of the holes.

Q What did you observe them doing?

A Oh, just as I -- I told them what was -- at first they didn't know what was going on. I pointed to the back of the truck, and I said, "There's a fire in the gas tank."

They went over and distinguished it.

Q You had a conversation with them; is that correct?

A Right. Then I was telling them what had just happened, and just then I saw the gray Cadillac again coming down the parkway and I told them, "That's the car that I saw," you know, from before, and they pursued the man up.

Q Well, you saw, they took off; is that correct? You didn't go with them?

A No, he was coming down, going north on Utopia at a very slow speed, and then he turned very quickly and made a right on Twenty-second Avenue and went away, real, real fast, and then I told the police that that was the man I saw, and they brought him back.

Q And then did the police subsequently arrive, come back, after they went off?

A Yes.

Q After this car, did they come back?

A Yes, yes, they did.

Q How shortly thereafter did they come back?

A It was about five minutes.

Q And what cars did you observe when the police came back?

A The Cadillac and the police car.

Q And did anybody get out of the car?

A Yes, the two policemen, and they had the man stand next to his car and they asked me if this was the man I saw, and I said "Yes."

Q And when you saw him -- withdrawn. Do you see that man in the courtroom today?

A Yes, I do.

Q Can you point him out, please, Miss Guze.

A He's right over there.

MR. SHANLEY: Let the record show that the witness is pointing to Mr. Benjamin Schwartzberg.

Q You're sure of that?

A Positive.

Q Why are you so positive?

MR. KESTNBAUM: Your Honor, I object to the operation of this witness's mind.

THE COURT: I'll allow her to explain how she identifies him.

A Well, I'm positive, because I know what I saw,

and what I saw is the same thing I see now, the same face, the same coloring, the same everything. I was just so scared that I got a good look at him. It's something that you remember.

MR. KESTNBAUM: Objection to this, your Honor.

THE COURT: I'll permit it.

MR. KESTNBAUM: Exception.

Q Now, Miss Guze, when you identified the defendant -- withdrawn. Did there come a time after, after the police had taken the defendant, Mr. Schwartzberg, away, did you subsequently go to the police station?

A Yes, I did.

Q And did you -- who did you observe down at the police station?

A Well, I saw Mr. Schwartzberg there. And then --

Q Was there anybody else down there at that time?

A The policemen and then Phil came. That's the other owner.

Q And was there any other women there?

A I don't recall.

Q Was Norma Steinberg down there?

A No.

Q She wasn't?

A I don't think so. Anyway, I didn't see her.

Q Miss Guze, after this incident, did you have occasion to talk to people, owners and employees of 21-44 Food Corporation about the defendant?

Did you have occasion to talk to them?

A Yes, everybody is --

Q What did they tell you about his reputation?

MR. KESTNBAUM: Your Honor, I object to that. I object very strenuously.

THE COURT: Sustained.

Q You were locked in; is that correct?

A Yes.

Q Now, who, if anybody, let you out that night?

A After I identified that man, I went to the phone and I called Phil, told him what happened.

MR. KESTNBAUM: Your Honor, I object to all this. The question was who let her out.

THE COURT: Sustained.

Q Did somebody let you out?

A Yes, that was Mrs. Steinberg.

MR. KESTNBAUM: Mr. Who?

THE WITNESS: Mrs. Steinberg.

Q Do you recall the name of the patrolman who you talked to?

A Yes, that was Patrolman Ward.

MR. SHANLEY: Your Honor, I would ask again that the statements made by Miss Regan to this witness during the course of this incident and especially when the truck, when she observed the truck being ignited, I think are relevant and goes once again to the res gestae and this statement made by Miss Regan to her.

THE COURT: What Miss Regan observed, she can come and testify to. What this witness observed, she can testify to. The statements that they made contemporaneously are not generally admissible under some special exception, which I rule does not apply here.

MR. SHANLEY: Thank you, your Honor.

BY MR. SHANLEY:

Q Miss Guze, just one or two more questions: When you saw, when you observed the defendant next to the back of the truck, did he walk or did he run back to his car after you saw the flames?

A He ran.

Q And did you see the flames start when he was close to the truck?

A Yes.

MR. SHANLEY: I have no further questions. Thank you, Miss Guze.

THE COURT: We'll take a short recess, ladies and gentlemen, the reporter has been working all day. Will you go into the jury room. The clerk will show you where, until you are called.

(Whereupon, the jury withdrew from the courtroom, and a short recess was taken.)

(The following ensued out of the presence of the jury:)

THE CLERK: Thirty-five hundred material, Grand Jury minutes, marked as Government's Exhibit 24 for identification, which is Grand Jury minutes dated July 29, 1970. The witness is Patricia Guze.

(So marked.)

MR. SHANLEY: Statement signed by Patricia Guze, dated July 27, 1970.

THE CLERK: Twenty-five for identification.

(So marked.)

MR. SHANLEY: Statement by Patricia Guze,

undated statement, made to a fire marshal, John Regan, and it's a two-page document.

THE CLERK: Government's Exhibit 26 for identification.

(So marked.)

MR. SHANLEY: A corroboration affidavit dated July 17, 1970.

THE CLERK: Twenty-seven for identification, Government's Exhibit.

(So marked.)

MR. SHANLEY: Report of interview dated July 27, 1970, a two-page report.

THE CLERK: Government's Exhibit 28 for identification.

(So marked.)

THE COURT: Bring in the jury, please.

(Whereupon, the jury entered the courtroom.)

(Government's witness, Patricia Guze, resumed the witness stand.)

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Now, Miss Guze, you have testified with reference to various events on July 17, 1970; is that correct?

A Yes.

Q And prior to that date and until the beginning of July, 1970, you had worked for Bagel Stop, for about six months, did you not?

A I started working there January of 1970 and I left in June of 1970.

Q Yes. And you've given us the date of July 17th?

A Right.

Q What causes you to remember that particular date and to fix these events as happening on July 17th?

A Well, because I was involved in the legal procedures. I know of it as to be July 17th.

Q And you've spoken to various officials, have you not?

A Yes, I have.

Q And did they remind you of the date?

A Yes. I went over my testimony and that was the date of my testimony.

Q You have spoken to an FBI agent, have you not?

A FBI agent.

Q And did you go over your testimony with any --

A Yes, I did.

Q With whom?

A With Mr. Shanley.

Q And with the FBI agent?

A Mr. Coonan, also.

MR. SHANLEY: For the record, your Honor, Mr. Coonan was a former prosecutor with us here.

Q How about the FBI agent, did you go over your testimony with him?

A Two men had come to Bagel Stop. I don't know who they were. I know they were officials.

Q Did you go over your testimony with them?

A No, I gave statements and told them exactly what had happened.

Q You know there's an FBI agent in the case, don't you?

A I really --

Q See the gentleman standing at the --

A Involved with the case.

Q Yes.

A Yes, I didn't go over it with him though.

Q Did you discuss the case with him also?

A Yes, discussed it.

MR. SHANLEY: Your Honor, I would just like to point out for the record, Mr. Duke is not an FBI agent. He's a special agent with the Department of Labor, so we can keep the record clear.

MR. KESTNBAUM: Thank you.

Q Now, did you have an argument with your folks on July 17th?

A July 16.

Q 16?

A Yes.

Q What day of the week was that?

A I don't recall.

Q Did you have an argument with both of your folks?

A Yes.

Q Your father and your mother?

A Yes.

Q What was it about?

MR. SHANLEY: Objection, your Honor.

THE COURT: I'll allow it. It's in the case in a way, go ahead.

MR. SHANLEY: How far outside the realm of relevant testimony will this go?

THE COURT: Well, I'm ruling it is relevant. The state of mind of this witness may affect the accuracy of her observation.

I take it that's the reason for the question?

MR. KESTNBAUM: That's right, your Honor.

A The truth is, at this time I do not remember what the fight was about.

Q You say "the truth at this time is"?

A It is the truth. I do not remember what it was.

Q Have you given us any testimony that is not the truth?

A It should be, it's hard to believe, what caused me to leave the house.

Q Have you given us any testimony today which is not the truth?

A Absolutely not.

Q Now, you had a friend named Diane?

A Yes.

Q Whom you say lived right around the block; is that right?

A Yes.

Q You spoke to her on the morning of July 17th?

A Yes.

Q On the phone you said?

A That's right.

Q Did she live alone?

A No, she was with her mother and I think she has a few sisters.

Q She has her own bedroom?

A I have no idea, I've never been in her home.

Q But you're a friend of hers?

A Yes.

Q Here you were out of your own home. Did you ask her if you might stay over at her house?

A We weren't that close. We were just friends from the store. I didn't want to put anybody out.

Q You had a friend with an apartment on Woodhaven Boulevard, didn't you?

MR. SHANLEY: Objection. What's this got to do, a friend with an apartment on Woodhaven Boulevard?

THE COURT: I can see the possible relevancy. I'll allow it.

A A friend with an apartment?

Q Sixty-third Road and Woodhaven Boulevard.

A Mr. Phil Reicher had an apartment there.

Q You had been there?

A Yes.

Q You slept there?

A No, absolutely not.

MR. SHANLEY: Is counsel trying to humiliate this witness?

MR. KESTNBAUM: Your Honor, I submit again it's too early to sum up in this case.

THE COURT: Unless there's a very good reason for this line of questioning, I don't understand why we are getting into it.

Do you want to explain at side-bar?

MR. KESTNBAUM: I'm getting to it, ultimately to the place where she did sleep and why, your Honor.

THE COURT: She, the witness?

MR. KESTNBAUM: The witness.

THE WITNESS: I testified that I didn't. I said that I didn't. I have never stayed there overnight.

BY MR. KESTNBAUM:

Q You had never stayed overnight?

A I said I never stayed there overnight. I was there maybe for an hour on two occasions.

Q Yes. Now, Mr. Philip, you call him, don't you?

A Phil Reicher.

Q You've called him Philip in this trial?

A I've called him Phil and Philip, I guess.

Q He was a friend of yours?

A He was my boss at the time in the Bagel Stop.

Q I asked you whether he was a friend of yours?

A Yes, he was my friend also.

Q You would stay for an hour or two at a time at his studio apartment?

A I went there twice. He got the apartment for the purpose of being close to his other business, which is on Queens Boulevard. I would go with him, sometimes we would go to the bank. We would drop off a deposit. He would get something. That's what I mean by going there.

Q He had an apartment for his family?

A Home.

Q On the Island, a home?

A Yes.

Q Where was that?

A He lives in Bellmore.

Q So this particular night, you decided to sleep at the Bagel Stop?

A Yes.

Q And you say there was a bed there?

A A cot, yes.

Q Where was the cot?

A It's in the office.

Q Where is the office?

A In the back of the store.

Q Is that part of the area -- is that part or area of the store air conditioned, the back of the store?

A I don't recall.

Q Is there any area that's air conditioned?

A I don't recall that either.

Q Didn't you testify this morning that the area with the cot was air conditioned?

A No, I didn't.

Q You didn't?

A I didn't.

Q Now, when you looked out the front, did you look -- were you at the window or were you behind the counter?

A At what time is this? When I first looked out?

Q When you first looked out.

A I was behind the bagel counter looking straight out through the glass.

Q Had you been on drugs in the year 1970?

A I have never been on any drugs.

Q Sure of that?

A I'm positive.

Q Now, when you went to the store to sleep over, you brought your nightclothes with you, did you not?

A No, I didn't.

Q Did you bring a nightgown?

A No.

Q Toothbrush?

A Nothing. I left angry, and I didn't think of getting anything.

Q And you were expecting to sleep there for the entire night; is that right?

A Yes.

Q And who was it who locked you in the store?

A The last person to leave was Darryl, he locked me in.

Q Was there any way for you to get out of that store?

A No, no way at all.

Q In case of fire, what would you have done?

A It would have been unfortunate, but I didn't think of that.

Q Do you have any other girlfriend in the area?

A I have a girlfriend, Randy, who worked at the bakery.

Q Did you ask if you could sleep over with her?

A No.

Q After you were locked in at 12:30 at night, did you expect anyone to call at the Bagel Stop?

MR. SHANLEY: Your Honor, I object to the form of the question.

THE COURT: I'll permit it.

Go ahead.

A Yes, I did.

Q Who did you expect to call at the Bagel Stop?

A Diane Regan.

Q I mean physically call at the Bagel Stop, not on the telephone?

A Nobody.

Q You didn't expect anyone?

A No.

Q Now, after you observed what you described to the jury this afternoon, the first one you spoke to was Diane, was it not?

A Yes.

Q Then you called the police?

A Right.

Q You're positive of that?

A To the best of my knowledge. That's exactly what I did.

Q Are you positive of that?

MR. SHANLEY: The witness testified to the best of her recollection, best of her knowledge.

THE COURT: You may ask again if you'd like.

Q You're positive of that?

A To the best of my knowledge.

Q Who was the next one you called?

A First I called Diane -- Diane called me, then I called the police. Then I called Phil. Then I called Mrs. Steinberg.

Q How long after you had called the police did you call Phil?

A I didn't call Phil.

Q Didn't you say --

A Right, yes, that's right. I thought you meant before I made any other calls. That was, I called the police, they got there in twenty minutes, I guess in twenty minutes.

Q You called the police, then you waited twenty minutes, then you called Phil?

A Right. That's what happened. I didn't talk to Phil until after the police were there, because I remember telling him that the man is outside with the police. So it was then. I waited for the police to get back.

Q That took twenty minutes?

A Right, for the police to come, it was about fifteen, and then to get him was about five, so it was twenty minutes.

Q It took the police approximately twenty minutes to get there from the time you first called, didn't it?

A About fifteen or twenty minutes, yes.

Q And all this time the truck was in flames?

A Yes.

Q Was it, the entire truck, in flames or any

particular part?

A Yes, the gas tank was in flames.

Q The gas tank was burning in this fifteen or twenty minutes until the police came?

A Yes, there were flames coming out of the gas tank for the whole time I was waiting for the police.

Q You saw the police arrive, did you not?

A Yes.

Q Where were you at the time?

A Well, I was in the back of the store, and they banged on the window for me to come out, because they knew somebody had called.

Q So you didn't see the police arrive?

A I saw them when I came out.

Q You were mistaken, weren't you?

A Yes, excuse me.

Q And then you don't know if the truck was constantly in flames, do you?

A I do know.

Q Well, you were in the back of the store, weren't you?

A When I came out it was still flaming, unless the flame stopped and flammed --

Q Before you went to the back, it was in

flames, when the police knocked it was in flames?

A When the police came, yes, it was still burning.

Q Do you know whether anyone put the flames out?

A Yes, that was Patrolman Bower, I'm almost positive of that.

Q Do I understand you correctly to say that the police came and you were alerted to their presence by a knock on the door? That they spoke to you and then extinguished the flames?

A Right, because they didn't know exactly what the story was. You know, when they first arrived, they didn't understand what I had called for.

Q They didn't know what was happening, did they?

A No. To the best of my knowledge, they didn't because when I told them, that's when they put it out.

MR. SHANLEY: Objection. You're asking for something which the witness is not able to testify to.

THE COURT: It's in evidence already. Move on, please.

Q When you looked out and saw the police, this truck was in flames?

A The truck wasn't in flames; the gas tank was.

Q The gas tank of the truck?

A It wasn't something you would immediately call your attention to, because it wasn't the whole truck in flames.

Q Only the gas tank?

A Right. I guess they didn't see it immediately. I had to tell them what the problem was, and that's when they took care of it.

Q How far from the truck were you when the police signalled you to come to the front?

A When I was to the front, I was between a glass.

Q Yes, but how far from the fuel tank were you when you weren't talking to the police?

A I'd say ten feet.

Q Ten feet?

A When I was talking to them.

Q They were less, weren't they?

A They were nine and a half because the window was there.

Q They were on the other side of the window, and you told them that the gas tank was in flames?

A Yes.

Q You saw them then go and put out the fire?

A Right.

Q Is that right?

A Yes.

Q You're sure of it?

A To the best of my knowledge, that's exactly what happened.

Q Now, when you saw the defendant at the rear of the truck, on which side of the truck was it, the left or right side?

A The right side of the rear.

Q The right side?

A Right.

Q Do you remember testifying before a Grand Jury in this case?

A There was another little hearing. I don't know what you call it.

Q Well, there were men sitting in a big jury box, twenty odd men; is that right?

A Yes.

Q That was in July of 1970?

A Is that the date? I'm not sure of it.

Q And before you testified, you were sworn, just as you were today, to tell the truth, the whole truth and nothing by the truth; is that right?

A Yes, sir.

Q Do you remember having been asked these questions and giving these answers?

"Question: Describe what he was doing.

"Answer: He was doing something with his hand by the gas tank."

A Excuse me?

Q "Question: That is on the left rear of the truck?

"Answer: Yes."

Do you remember?

A Yes.

Q Now, was it the left or the right?

A It's the left, I'm sorry.

Q Now, you want to correct your former testimony, don't you?

A Yes.

Q Now, I ask you again, didn't you make a telephone call to a third party before you called the police?

A No, I didn't.

Q The only one you spoke to was Diane before you called the police; is that right?

A Right.

Q And you were not expecting Phil to come over to the store?

A No, sir, I wasn't.

Q And the reason you were at that store is because you had an argument with your folks?

A Yes.

Q With both of them?

A Yes.

MR. KESTNBAUM: That's all.

THE COURT: Any redirect?

MR. SHANLEY: May I have one minute, your Honor?

I have no further questions.

THE COURT: Step down, Miss, we won't need you any further.

(The witness was excused.)

MR. SHANLEY: Government calls as its next witness Patrolman Ward.

P a t r o l m a n J A M E S J. W A R D, New York City Police Department, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Patrolman James J. Ward,

Shield number 24047, 111th Precinct, Bayside.

THE CLERK: Spell your last name, please.

THE WITNESS: W-a-r-d.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. CHANIFY:

Q How old are you, Patrolman Ward?

A Thirty-two.

Q How long have you been on the force?

A A little over ten years.

Q To what precinct are you assigned?

A 111th Precinct in Bayside.

Q What area does that geographic area cover?

A Bayside, Little Neck, Douglaston, Whitestone, part of Flushing.

Q Actually, it's the largest precinct in the New York City Police Department; is that correct?

A Just about, one of the largest.

Q It borders on the Nassau County line?

A Yes.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q Were you in the service?

A Yes.

Q For how long were you in the service?

A Three and a half years.

Q What kind of a discharge did you get?

A Honorable.

Q I notice you have some things on your -- above your shield. Are those citations?

A Yes.

MR. KESTNBAUM: Your Honor, I don't know how long we are going. I submit this is irrelevant to the issues.

THE COURT: I think we have gone far enough. Proceed with the facts in dispute.

MR. SHANLEY: Yes, your Honor.

Q Now, directing your attention, Patrolman Ward, to the night of July 16th and the early morning hours of July 17th of 1970, were you on patrol that day?

A Yes, I was.

Q On foot?

A Radio motor patrol.

Q And what was your shift?

A Twelve to eight.

Q And were you alone?

A No, I wasn't.

Q Who were you with?

A My partner.

Q What was his name?

A Patrolman John Brower.

Q Did there come a time during your patrol that you had occasion to go to the area of Utopia Parkway?

A Yes, I did.

Q Could you approximate the time?

A Approximately 1 o'clock in the morning.

Q That would be on July 17th?

A Yes.

Q And how did this come about?

A Well, about 1 o'clock in the morning we received a radio run, of a 1059 truck on fire.

Q So what did you do when you got that?

A We acknowledged the call and responded to the location.

Q And do you recall where the location was?

A Yes.

Q Where was that?

A 21-44 Utopia Parkway.

Q Tell the Court and jury what happened when

you got there?

A Well, when we first arrived on the scene, we were on the opposite side of the street and there was a truck parked in front of the location. At first, we observed nothing.

Q So what did you do then?

A We made a U-turn and pulled our vehicle behind the truck in front of the location.

Q And do you recall what you did next?

A Yes, we both got out of the radio car and went over towards the truck.

Q Do you recall whether or not you saw anybody at that time?

A Excuse me, any person?

Q Any person.

A No.

Q Then what did you do?

A Well, we observed flames coming from the gas tank of the truck.

Q What did you do then?

A We went back to the radio car, moved the radio car back several feet and we took the fire extinguisher out of the trunk and extinguished the fire.

Q Which direction was the truck facing?

A Southbound.

Q Did you observe anybody in the store adjacent to the truck?

A Yes.

Q Who was that?

A Patricia Guze.

Q A person who was later found out to be Patricia Guze?

A Right, person later found out.

Q Did you have a conversation with her?

A Yes, I did.

Q What --

MR. SHANLEY: Well, I'm anticipating an objection, your Honor.

Q What did she say to you, if anything?

A After what we had, after the action we had taken, we went over to the store, had seen her in the store, and went over and talked to her and asked her what she was doing there, and she told us what she had seen.

Q What did she say she had seen?

MR. KESTNBAUM: Objected to, your Honor.

Q Did she describe anybody?

A Yes she did.

Q This description, what did she tell you that she had seen this person doing?

MR. KESTNBAUM: Your Honor, that's the same question, in other words.

THE COURT: I know. It's a proper question. I'll allow it under these circumstances.

Go ahead.

A The description of the person she had seen.

Q Yes, what did she say, what did she tell you he looked like and also what was he doing?

A Well, she observed a male white, elderly man in a white uniform, gray hair, operating a dark colored gray Caddy, pull up behind the truck, go to the side in the vicinity of the gas tank and was there a couple of minutes and then she observed the flame and he ran back to his car and left.

Q And she gave you this description at that time?

A Yes.

Q Now, do you recall the lighting conditions in that area?

A Yes.

Q Around the truck?

A The street was illuminated.

Q Now, while you were there, did the fire department arrive?

A Yes.

Q And could you approximate how long you stayed in that area after you had arrived?

A Well, the total time was about forty-five minutes.

Q Then what happened, if anything?

A Well, from the time the fire department responded, they were at the scene approximately twenty minutes, twenty-five minutes. After they had left and we finished taking our information, we were on our way back to the station house.

Q Now, you -- what radio transmissions, if anything, did you make?

A We went a signal 1098, which means we resumed patrol.

Q At that point or shortly thereafter, did you observe anything?

A Yes, we did.

Q What did you see?

A I observed a vehicle coming northbound on Utopia Parkway make a right-hand turn on Twenty-second Avenue.

It seemed to fit the description of the vehicle the witness had told us about, and we went after it, you know, the same vehicle.

Q Do you recall Miss Guze saying anything to you at that time?

A Nothing, myself, personally. She might have, but I probably didn't hear her if she did.

Q What did you do at that point?

A We went after the vehicle.

Q How far did you follow it?

A Approximately two blocks, two and a half blocks.

Q Then what happened?

A We pulled alongside the operator and motioned him to pull over.

Q And what did you do?

A I got out of the radio car and I asked to see his license and registration.

Q Did you see his license and registration?

A Yes, I did.

Q And what did his license and registration say, do you recall?

A It had his name and his address.

Q What was his name?

A Benjamin Schwartzberg.

Q Do you recall his address?

A Yes, 96 Grist Mill Lane, Great Neck.

Q How was this Mr. Schwartzberg dressed?

A In a white uniform.

Q Did you have a conversation with him?

A I asked him where he was coming from, and he stated his place of business in Flushing.

Q Did you ask him anything else?

A I asked him where he was going to. He said he was going home.

Q Then what did you do?

A Being that he fit the description of the person, the information we had taken from the witness --

MR. KESTNBAUM: Your Honor, object to that. The question is what did he do.

MR. SHANLEY: I think the witness is just qualifying --

THE COURT: All right, you may answer.

Q What did you do then?

A Well, we returned to the location, 21-44 Utopia Parkway.

Q Before you returned to the location, what other questions, if any, did you ask Mr. Schwartzberg?

A Nothing, sir.

Q Did you ask him to come back with you?

A I asked him to return to the location.

MR. KESTNBAUM: Objection, your Honor. He has answered the question. Objection to counsel leading in this way.

THE COURT: I'll overrule it. Go ahead.

Q What car did you return in?

A I returned in his car.

Q What did Patrolman Brower do?

A He followed in the radio car.

Q Where did he go?

A He went back to the location.

Q What's the location?

A 21-44 Utopia Parkway.

Q Now, what did you do when he got there?

A He was identified by the witness as being the same person at the scene.

Q What did you physically do when you got there?

A We got out of the car and he was identified by the witness.

Q Do you recall any conversation at that point?

A Nothing.

Q When the witness identified him, was he standing?

A Yes.

Q And then what did you do then?

A Well, after she identified him, then we started to make the procedures to go into the station house with him.

Q You put him under arrest; is that correct?

A Yes.

Q Patrolman Ward, how long have you lived -- how long -- withdrawn.

Are you familiar with Flushing?

A Yes.

Q Have you resided there?

A Yes.

Q For how long?

A Ten to twelve years.

Q Are you familiar with the main roads that go back and forth in that area?

A Yes, I am.

Q You drive them a lot?

A Yes.

MR. SHANLEY: Please mark Hagstrom's Pocket Atlas of the City of New York for identification.

THE CLERK: Government's Exhibit 29 for identification.

(So marked.)

MR. SHANLEY: Please mark this photograph for identification.

THE CLERK: That will be Government's Exhibit 30 for identification.

(So marked.)

MR. SHANLEY: Your Honor, at this time I would like to have the Court take judicial notice of the fact that Hagstrom's Pocket Atlas is an accurate representation of the maps therein and the maps therein are an accurate representation of the streets of New York.

THE COURT: Well, counsel will look at it. It's fairly accurate for these purposes. If counsel has any objection, I'll hear them, otherwise it is reasonably accurate.

I suspect you're going to be some time with this witness and direct and cross?

MR. KESTNBAUM: Yes, your Honor.

THE COURT: I have a Board of Judges meeting. We can't go any further tonight. I'm sorry, officer. We'll have to bring you back tomorrow.

Brooklyn, N. Y., September 18, 1973.

(The trial was continued. The jury is not present.)

MR. SHANLEY: Yesterday afternoon, I turned over some 3500 material to Mr. Kestnbaum, 3500 material of the witness, Patrolman Ward.

At this time, I would like to have it marked for identification. The first is Grand Jury minutes dated August 5, 1970.

THE CLERK: Government's Exhibit 31 for identification.

(So marked.)

MR. SHANLEY: General misdemeanor affidavit dated July 17th, 1970.

THE CLERK: Government's Exhibit 32 for identification.

(So marked.)

MR. SHANLEY: Two-page document, pages 19 and 20, is a photostat of the Patrolman Ward's memo book.

THE CLERK: Government's Exhibit 33 for identification.

(So marked.)

MR. SHANLEY: Let the record show that I am handing Mr. Kestnbaum 3500 material for

witness Diane Regan. I just handed material for a witness named Diane Regan and at this time I would like to have Grand Jury testimony, dated July 29, 1970, of Diane Regan marked for identification.

THE CLERK: Government's Exhibit 34 for identification.

(So marked.)

MR. SHANLEY: And a one-page statement apparently signed by Diane Regan, dated July 27, I'd like to offer that for identification.

THE CLERK: Government's Exhibit 35 for identification.

(So marked.)

MR. SHANLEY: I'd also like at this time to mark for identification 3500 material of Fire Marshal John B. Regan, the Grand Jury testimony dated July 29, 1970.

THE CLERK: Government's Exhibit 36 for identification.

(So marked.)

MR. SHANLEY: A statement dated July 29, 1970.

THE CLERK: Government's Exhibit 37 for

identification.

(So marked.)

MR. SHANLEY: A statement, two-page statement, report, two-page report of John Regan, undated. I think it's hard to decipher whether it's undated or not. It's a two-page report.

THE CLERK: Government's Exhibit 38 for identification.

(So marked.)

THE COURT: Bring in the jury.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. I'm sorry to have delayed you. We were working on other cases.

Proceed, please.

MR. SHANLEY: Yes, your Honor. The Government continues the examination of Patrolman Ward.

THE COURT: Yes, have him take the stand.

Patrolman JAMES J. WARD, previously called as a witness in behalf of the Government, resumed the witness stand, and testified further as follows:

THE CLERK: You have been previously sworn, Patrolman Ward. You are still under oath.

THE WITNESS: Yes.

DIRECT EXAMINATION

BY MR. SHANLEY: (Cont'd)

Q Patrolman Ward, we left off yesterday afternoon, we had marked two exhibits for identification and submitted them to, the map, to Mr. Kestnbaum to look at.

MR. SHANLEY: At this time, your Honor, I would like to offer, I would like the Court to take judicial notice of the fact that Hagstrom's Pocket Atlas is an accurate representation of the map of the City of New York, and in particular pages 12, map number 12 and map number 13, which are on pages 28, 29, 30, and 31.

THE COURT: No objection being made, judicial notice is taken.

Proceed.

MR. SHANLEY: Next, at this time I would like to offer a photo enlargement of maps number 12 and number 13, which have been arranged by Patrolman Ward to accurately represent the area which they emcompass. And they are accurate representations of the photo enlargements of pages -- of maps number 12 and number 13.

MR. KESTNBAUM: All right, no objection.

THE COURT: Mark it in evidence.

THE CLERK: Government's Exhibit 30 for identification is marked in evidence.

(So marked.)

THE CLERK: Government's Exhibit 29 for identification is marked in evidence.

(So marked.)

BY MR. SHANLEY:

Q Now, Patrolman Ward, you helped put together this composite yesterday; is that correct?

A Yes.

MR. SHANLEY: Your Honor, is it better to have it facing the jury? Maybe we can have it in a way, perhaps, over here where everybody can see it.

No, I want the defendant --

THE COURT: He can move. You wouldn't be able to go too far from the jury. Have it facing the jury.

Q Now, Patrolman Ward, please come up and -- Now, this is -- is this the map you put together yesterday afternoon?

A Yes, it is.

Q Now, I notice here there's an arrow. Did you put that arrow in there?

A Yes.

Q Now, will you explain to the jury and the Court just what that arrow signifies, as best you can?

A Well, this is Utopia Parkway, and the arrow is facing northbound in the direction which we observed the vehicle going.

Q Now, will you mark for the Court and jury, please, the direction you saw -- and when you say the "vehicle," this is the gray Cadillac on the morning of July 17th?

A Yes.

Q Would you mark the direction in which you saw the car turn.

A It made a right-hand turn eastbound.

Q And what street is that on?

A It's Twenty-second Avenue.

Q Now, Patrolman Ward, do you know the exact place where you finally stopped the defendant?

A On 201st Street in the vicinity of Twenty-second Avenue and Twenty-third Avenue.

Q You can't recall exactly where it was?

A No, not the exact location, no.

Q Now, you -- this is 201st Street, this is Twenty-second Avenue?

A Right.

Q You drew the line on; is that correct?

A Yes.

Q Patrolman Ward, I notice you testified before the Grand Jury that you stopped the vehicle --

MR. KESTNBAUM: Your Honor, I object to what he testified to before a Grand Jury.

THE COURT: Sustained.

Q Is this accurate, is this your best recollection of where you stopped the vehicle?

A Yes. Well, we actually made the right-hand turn on 201st Street and stopped him midway in the block, somewhere in the vicinity of Twenty-second Avenue and Twenty-third.

Q When he turned off Utopia Parkway, what street did he turn off?

A Twenty-second Avenue.

Q Okay, thank you, Patrolman Ward, you can sit down -- oh, before you go, Patrolman Ward, you are familiar with this area; is that correct?

A Yes.

Q Will you point out the Long Island

Expressway to the Court and jury on this map.

A Right here.

Q Would you draw a red mark on that.

MR. SHANLEY: Let the record indicate the witness has drawn a red arrow on a street purporting to be the Long Island Expressway.

Q Now, Patrolman Ward, will you please take your seat.

Now, Patrolman Ward, when you first observed the car of the defendant, the gray Cadillac, on the morning of July 17th, how fast was that going, if you could approximate?

A I would -- I would estimate at least twenty-five miles an hour.

Q Now, do you recognize the man that you arrested that night? Do you see him in the courtroom today?

A Yes, I do.

Q Would you point him out, please.

A It's the gentleman sitting at the far table.

MR. SHANLEY: Let the record indicate that the witness is pointing to the defendant.

Q Now, in the course of your patrols over the years, Patrolman Ward, have you had occasion to

drive in the course of your duties on the Long Island Expressway 1 or 2 o'clock in the morning?

A Yes.

Q What's been your experience with the traffic at that time?

A Very light.

MR. SHANLEY: Thank you, Patrolman Ward. I have no further questions.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Now, Patrolman Ward, you testified in direct, did you not, that you arrived at the scene in the early morning of July 17, 1970; is that right?

A Yes, it is.

Q And what is your best estimate of the time at which you arrived?

A Approximately 1:10, maybe 1:12. Like I say, approximate times I put down. I never put down direct time.

Q Yes. And you arrived because by radio you had learned of a motor vehicle on fire; is that right?

A That's correct.

Q And you knew the location where the motor

vehicle was on fire also, did you not?

A That's correct.

Q In fact, you knew the exact location; is that correct?

A That's correct.

Q Now, when you arrived at the scene, were there any other motor vehicles there, except for the truck?

A Not that I recall. I'm positive the truck was the only one on the block.

Q So that your attention was immediately directed to this truck?

A Yes, it was.

Q It wasn't on fire so your attention was directed to it?

A No, not at first glance, when we first pulled onto Utopia Parkway.

Q Then you made a turn, did you not?

A Yes, I did.

Q You finally came to a stop behind the truck?

A Yes.

Q How many feet behind the truck?

A Five feet, maybe.

Q Was it on fire then?

A Not directly as we pulled up behind the truck, we didn't observe anything at that time, no.

Q Then as you came along, that is, you pulled up behind the truck, there was no sign of a fire in the truck; is that correct?

A Could you repeat that again?

MR. KESTNBAUM: May I have the reporter read that back, your Honor?

(The last question was read by the court reporter.)

A Not that we observed at that time, no.

Q Well, as far as you know, the truck was not on fire?

MR. SHANLEY: Objection, your Honor.

Q At that time?

MR. SHANLEY: Object to the form of the question; asking for a witness's state of mind.

THE COURT: Well, there's nothing wrong with the state of mind of the witness.

Overruled.

A Like I said, not that we observed at that time, no.

Q Yes. But then there came a time when you

did observe a fire coming from the gas tank area; is that right?

A That's correct.

Q How long after you arrived did you first observe the fire?

A When we pulled out to the block, the truck was in front of the store. We swung around, made a U-turn and pulled in front of the vehicle. My partner and I got out of the vehicle and walked towards the truck and that's when we observed the flames coming from the gas tank.

Q What did you do then?

A We went back in the radio car and went a way down the block and took the fire extinguisher out of the trunk.

Q What did you do then?

A Extinguish the flames.

Q You put the fire out completely, didn't you?

A To the best of our recollection, yes.

Q As far as you could observe, was there any damage to the truck?

A Well, I didn't get too close to it at that time. But I couldn't really say. I don't recall exactly if

we had gone back and looked in there or if there was damage or burn marks, I couldn't tell.

Q You were close enough to put a fire extinguisher into it, weren't you?

A Well, the spray from the extinguisher can go a couple of feet. We weren't directly on top of it.

Q But you were within a foot or two of the truck, weren't you?

A Two feet, three feet. Like I say, at a time like that --

Q You could observe no damage to the truck when you put out the fire?

A I wasn't looking for any damage.

Q But your attention was directed to the truck, nevertheless, was it not?

A Yes, to extinguish the fire, yes.

Q Yes. Your eyes were riveted on the truck for a period of time?

A Yes, when we saw the flames, yes.

Q Did you or did you not see any damage to the truck?

A Not that I recall.

Q Now, at that point, you had not seen Miss Guze, had you, Patricia Guze?

A No, at that point I didn't see her in the store, no.

Q When for the first time did you see her?

A After we had extinguished the flames and moved back to the radio car.

Q Where was she?

A She was in the store.

Q In the front, in the back?

A On the left side of the store.

Q She was watching you, wasn't she?

A I assume she was, yes.

Q Did you speak to her as soon as you arrived?

A No.

Q At the store?

A Not that I recall.

Q What happened then?

A Well, after I observed her in the store, I went over and talked to her.

Q Yes. As soon as you got to the store?

A I said not that I recall, as soon as I got there.

Q Well, within a second or two or a short lapse?

A Five minutes or so after we had come up, a couple

of minutes after.

Q But she was in the front of the store watching this, wasn't she?

A Yes, I said I assume she was, yes.

Q Did you have to rap on the windows or make any noise to attract her attention?

A No.

Q Are you aware of the fact that she testified yesterday that she was in the back of the store --

MR. SHANLEY: Objection, your Honor.

MR. KESTNBAUM: May I finish my question?

THE COURT: Yes, of course.

Q -- that she was in the back of the store, and you had to rap on the windows to get her to come to the front?

A Not that I recall. I don't recall doing that, sir.

Q You're quite certain you didn't do that, aren't you?

A That I rapped on the window, myself, yes I'm certain I didn't rap on the window.

Q You're certain she was at the front of the store watching you?

A She was on to the left side of the store, yes.

Q Yes. Are you aware of the fact that she

testified --

MR. SHANLEY: Objection, your Honor, the form of the question.

THE COURT: I'll allow it.

MR. SHANLEY: The witness was not here when this woman testified. He's asking her if he's aware of the fact that she testified as to some fact.

THE COURT: He might have been made aware of it in a variety of ways. It's an appropriate question.

Q Are you aware of the fact that she testified yesterday that you knocked, she came to the front; that you spoke to her, and that you then went out and put out the flames in the truck?

A No.

Q Are you aware of that?

A No.

Q That never happened, did it?

A Not that I recall, no.

Q You were aware of the fact that she testified yesterday that in the course of the conversation she pointed to the car and said "That is the car," indicating the burning truck? Did that happen?

A No, not that I recall, no.

Q Now, you had a conversation with her at that time, didn't you?

A Yes.

Q And how long a time did you talk to her?

A Five or ten minutes.

Q And did your partner, Patrolman Brower, participate in the conversation?

A Well, he was there, yes. I don't remember exactly if we were both talking or I was talking.

Q Did she tell you that she was in the employ of the Bagel Stop?

A If I remember correctly, she did say she was.

Q Did she ever tell you that she had left the employ of the Bagel Stop a month before?

A I tell you, I do not recall the exact conversation I had with her at that time.

Q But she did tell you that she was in the employ of the Bagel Stop on July 17th, 1970, didn't she?

A Like I said, I do not recall exactly what the conversation was.

Q Yes. But you made notes at that time, didn't you, sir?

A I made some notes, yes.

Q When did you make your notes, the same day?

A The following day -- the same day, but later on in the afternoon.

Q Now, I want to show you a copy of the notes you made that same day or the following day, and please read the opening sentence where I have indicated.

A At 0120?

Q Yes. Read it to yourself. Just the opening sentence, sir.

A Yes.

Q Does that refresh your recollection as to whether or not she told you she was an employee of Bagel Stop at that time?

A If it's in my report, I guess that's what she told me.

Q So then on July 17th in the early morning hours when you spoke to her, she told you she was an employee of Bagel Stop; is that right?

THE WITNESS: Your Honor, can I explain? The memo book entry --

THE COURT: Well, you mean you can't answer it yes or no?

THE WITNESS: Well, like I said, these notes

are made, these notes were made the following day, and I recall from memory and I put down in my memo book. Like I said, I do not recall the exact conversation at that time. But that afternoon when I put my entries in the memo book, I might have recalled her saying she was an employee. It wasn't put into that memo book at that time. It's information for my review.

BY MR. [illegible]STNBAUM:

Q You made your entries when your memory was good and fresh?

A That afternoon, yes.

Q It was within a day of when it happened?

A Yes.

Q Your entry was she was an employee, wasn't it?

A Right.

Q Did she tell you what she was doing there that date?

A There was previous criminal mischief to the store. There was a few broken windows there, and she was there to find out if she could find out who was committing the act.

Q She was acting on behalf of the owners of

the Bagel Stop, wasn't she?

MR. SHANLEY: I object to the form of the question, your Honor. I'd also object to all these questions which are asking for hearsay.

THE COURT: They come in on credibility. I'll allow them.

You may answer.

Q Will you answer.

A Yes.

Q She was working for Bagel Stop that night; is that right?

A At that time, I assume she was, yes.

Q Well, she told you she was?

A Like I said, as I recall and made my entries, that's the way I assume she was.

Q She told you she was in the store to look for acts of vandalism, didn't she?

A That's correct.

Q Didn't that strike you odd, officer, to have a girl, an eighteen-year old girl, locked in the store at that hour of the morning and to detect vandalism?

A It depends on how bad they wanted to find out who's doing the acts of criminal mischief.

Q From your experience as a police officer,

is that a way you would go about ascertaining criminal mischief?

A I've known people to sleep in the store overnight if they could find someone doing it.

Q Eighteen years old, officer?

A Not eighteen years old. There's been different type of people.

Q You would have a security officer, wouldn't you?

A Not necessarily.

Q Did she ever refer to her folks in the conversation?

MR. SHANLEY: Your Honor, I object to this. This is, the witness -- counsel is attempting to impeach another witness through the mouth of this witness.

THE COURT: Well, of course, that's what he's intending to do. Whether he does it or not is for the jury to decide.

Q Will you answer that, officer.

A Could you repeat the question, please.

Q Did she ever mention her folks in connection with the conversation you had with her then?

A She might have. But like I said, I don't remember

all of the conversation that I had with her that evening.

Q Now, did the girl give you the name, this young lady, did she give you the name of the owner of the car when you spoke to her?

A No, not at first. Maybe she did, maybe she did tell me who the owner of the vehicle was. I don't recall if I asked for the owner at that time.

Q Can you recall whether or not she told you who owned that gray Cadillac we have been talking about?

A Oh, no.

Q You can't recall?

A No.

Q Do you recall testifying before a Grand Jury in this case in August of 1970?

A Yes.

MR. KESTNBAUM: Page 6, Mr. Shanley.

Q Do you recall having been asked this question and having given this answer?

"Question: After the fire department was on the scene, what did you do?

"Answer: We talked to the girl and got the name of the owner of the vehicle and her name and so on."

Do you recall that testimony?

A Yes, it sounds familiar, yes.

Q And that testimony was truthful, was it not?

A Yes.

Q So that when you first spoke to her that morning, she gave you the name of the owner of the vehicle?

MR. SHANLEY: Your Honor, could we identify the vehicle involved here?

THE COURT: I believe he's referring to the truck.

MR. KESTNBAUM: Your Honor --

Q The truck?

A Yes, the truck.

Q She told you who owned it?

A The truck, yes, sir.

Q She told you who owned the Cadillac, didn't she?

A No, she didn't.

Q Well, now, let me read the preceding question and answer to you.

MR. KESTNBAUM: Again on page 6.

Q "Question: Did she describe this person to you?

"Answer: Yes. An elderly man in a white uniform in a dark gray Cadillac.

"Question: After the fire department was on the scene, what did you do?

"Answer: We talked to the girl and got the name of the owner of the vehicle."

Weren't you talking about the Cadillac?

A No, sir, I wasn't. I was talking about the truck.

Q Do you recall that she gave you the name of the owner of the Cadillac?

MR. SHANLEY: Your Honor, this has been the fourth time he has asked the witness this question. First he said he did not recall. He said "She did not tell me who owned the Cadillac." I think that ends that line of questioning.

THE COURT: You may probe, go ahead.

MR. KESTNBAUM: It's going to be difficult if answers are indicated to the witness.

MR. SHANLEY: The witness just testified to that.

BY MR. KESTNBAUM:

Q Now, when you spoke to Patricia Guze about the reason for her being in the store, she did tell you that she was left in the store by the owners

to see if she could find out anybody who was doing any damage to the store; isn't that what she told you?

A At first, yes.

Q At first. Well, what did she tell you at second or later?

A Just, to say at first that is what she told me, besides giving me other information.

MR. SHANLEY: Your Honor, he asked the witness what she told him later. Could the witness answer that question?

THE COURT: Proceed with your questions, please.

MR. KESTNBAUM: I beg your pardon?

THE COURT: Proceed.

MR. KESTNBAUM: Yes, your Honor.

Q Now, in the course of your conversation with Patricia, did she tell you that she expected her boss to join her in this security search later in the morning?

A No.

Q Was there any mention made of her boss?

A Nc.

MR. KESTINBAUM: With the Court's permission.

Q Officer, would you indicate on this exhibit,

the Government's Exhibit 30 in evidence, just where 20-03 Utopia Parkway is?

A 20-03?

Q Does that show on your map?

A Well, it doesn't have the addresses.

Q Would you put a "U" in the approximate place where 20-03 Utopia Parkway is.

A Exactly where 20-03 is?

Q As best you can, would you put a "U" there.

A Somewhere in this area here.

MR. KESTNBAUM: Indicating an area approximately a block and a half from the Bagel Stop.

Q Is that right?

A It's about that, right.

Q Yes. While you're here, would you indicate where 160-34 Willets Point Boulevard is, the approximate area.

A It's in this area here someplace.

MR. KESTNBAUM: Indicating an area of several blocks from the Bagel Stop.

Q Is that correct?

A Somewhere around there.

Q Would you indicate where 160-08 --

THE COURT: Did he use an "X" for that?

MR. KESTNBAUM: Yes. The trouble is that this pen --

THE WITNESS: I have another pen.

Q Would you, start by putting a "U" for 20-03 Utopia Parkway.

A (Witness indicates.)

Q And would you put a "W" for 160-34 Willets Point Boulevard.

A I would assume it's somewhere in this vicinity right here.

Q That's a distance of several blocks, isn't it, from the Bagel Stop? Would you put a "W1" where 160-08 Willets Point Boulevard is.

A That's where I just put that.

Q That's -- this is the same place, the same block?

A The approximate area.

Q Would you put an "F" where Francis Lewis and Thirty-fifth Avenues are.

A What did you say, with an "X"?

Q "W1."

Now, you've indicated something within about seven or eight blocks --

MR. SHANLEY: Excuse me, counselor, "W1"

is 160-08 Francis Lewis Boulevard. And "F" is Thirty-fifth Avenue and Francis Lewis Boulevard is?

MR. KESTNBAUM: Yes.

MR. SHANLEY: Thank you.

BY MR. KESTNBAUM:

Q While you're here, officer, would you be good enough to put a "6" where Sixty-third Road and Woodhaven Boulevard are. Sixty-third Road and Woodhaven Boulevard.

A Exactly what?

Q Can you find Woodhaven Boulevard for us?

A That's what I'm looking for, Woodhaven Boulevard.

THE COURT: West is Flushing Meadow.

Q It doesn't seem to appear on the map, does it, officer?

A I can't locate it.

Q Thank you very much. Would you resume the stand, sir.

Would you estimate for us as best you can how far Sixty-third Road and Woodhaven Boulevard are from the Bagel Stop?

A The exact, I couldn't, because I don't know where Sixty-third Road and Woodhaven Boulevard are.

Q You know that Woodhaven Boulevard crosses Queens Boulevard, don't you, and it runs along Forest Park in Queens; is that correct?

A I couldn't say.

THE COURT: I don't think it's in his precinct.

Q That's well outside your precinct?

A Yes.

Q And it would be a good distance from the Bagel Stop, wouldn't it?

A It sounds like it is.

Q Yes. Now, I've asked you about 20-03 Utopia Parkway. That's in your picture?

A Yes.

Q Do you know whether or not there was and is a bagel store or a bakery at that address?

A 20-03?

Q Yes.

A I don't think so. That's all private homes there.

Q Did you ever hear of the Denise Pastry, D-e-n-i-s-e?

A Denise Pastry? On the right-hand side of the street, there is a bakery, right.

Q Yes. Bakery and bagel store, isn't there?

A I don't know if it's a bagel store.

Q 160-34 Willets Point Boulevard, there's a bakery --

MR. SHANLEY: Your Honor, we have been listening to this for a while. I would inquire as to the relevance of this line of questioning.

THE COURT: I'll concede the relevancy. I'll allow it. Go ahead.

Q At 160-34 Willets Point Boulevard, there's another bakery?

A Yes, there's a bakery.

Q At 160-08 Willets Point Boulevard, there's another bakery?

A That's the same --

MR. SHANLEY: Question of the time frame.

Q At the time on July 17, 1970.

MR. SHANLEY: I think, your Honor, it's very difficult for the witness to recall exact locations of bakeries in a very large precinct.

THE COURT: He'll tell us if he doesn't recall, he'll say.

Q Is there an appetizing store -- or a bakery at that address?

A I know on Willets Point Boulevard, near Francis

Lewis there's a bakery and deli of some sort.

Q Is that the Clearview Appetizing store?

A I know there's a few stores there, delis and other things.

Q At Francis Lewis and Thirty-fifth Avenue, there's another bakery; isn't there?

A There's a shopping center there with Waldbaum's.

Q Yes. You made many, many tours of duty through that area, have you not?

A At different times, yes.

Q You know from your own knowledge and your own observation that deliveries of bagels and baked products are made in the very early hours of the morning, you know that, don't you?

A I've seen them deliver in early morning hours.

Q Thank you.

MR. KESTNBAUM: That's all -- just one more question.

Q When you first came upon the scene, did you observe any vehicles pass by?

A Not that I recall, no.

Q When the fire department truck came, did you observe any vehicles?

A Well, I wasn't looking for any, I tell you, but

they might have passed on the other side of the street, I don't know.

Q You wouldn't know if they passed right by you?

A No, because the fire truck was in the block.

MR. KESTNBAUM: All right, that's all.

MR. SHANLEY: No further questions.

THE COURT: Thank you. Next witness. Thank you, officer.

(The witness was excused.)

MR. SHANLEY: Government calls as its next witness, Miss Diane Regan.

D I A N E R E G A N, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Diane Regan.

THE CLERK: Spell your last name.

THE WITNESS: R-e-g-a-n.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Miss Regan, how old are you?

A Twenty.

Q Now, you'll have to keep your voice up so all the jurors can hear.

A I'm twenty years old.

Q And what are you doing now?

A Well, I go to school, upstate.

Q And do you live at school?

A Yes, I do.

Q And do you have a home in Queens?

A Yes.

Q Do you live with your parents?

A Yes.

Q And what's that address?

A 166-54 Twenty-first Road, Whitestone.

Q Now, Miss Regan, do you know a young lady by the name of Pat Guze?

A Yes.

Q How long have you known her?

A About three years. While I was working.

Q Now, directing your attention to the year 1970, how old were you then?

A Seventeen.

Q And were you employed at any time during that year?

A Yes.

Q By whom were you employed?

A Bagel Stop.

Q How long were you employed, if you can recall?

A About three months.

Q And do you, can you approximate the time of the year?

A It was around April.

Q Now, directing your attention to summer of 1970 -- oh, before I -- withdrawn.

What were your normal hours when you worked in the Bagel Stop?

A Well, I worked five hours every day. I worked from maybe five to seven or sometimes during the afternoon. It was different hours of the day.

Q Five in the morning to eleven?

A No, five at night to eleven.

Q I see.

Did you know the owners of that --

A Yes.

Q Who were they?

A Well, there was Phil and Steve, I knew, and Eugene.

Q Who was your boss?

A Phil.

Q Phil? Phil Reicher?

A Reicher.

Q Now, did there come a time in the summer of 1970 that you were at, on the premises of the Bagel Stop late at night?

A Yes.

Q And can you approximate the month?

A It was July.

Q And do you remember the exact day?

A I guess it was around the 16th, 17th.

Q It was mid-July?

A Yes.

Q And do you recall on that evening what time did you leave the store on that evening?

A I'd say around 11 o'clock.

Q And when you left the store, where did you go?

A I went home.

Q Now, did there come a time that particular evening that you received a telephone call?

A No.

Q Did there come a time when you made a call?

A Yes.

Q And who did you call?

A I called Pat.

Q And what, where -- where was the call made to, if you know?

A I called her at Bagel Stop.

Q Do you happen to remember the number of Bagel Stop?

A No, I don't.

Q Now, did you have a conversation with Pat?

A Yes.

Q Now, during this conversation with Pat, where were you in your house?

A I was in my bedroom.

Q And does your bedroom have a window?

A Yes.

Q And where does the window look out on?

A It looks out onto Twenty-First Road.

Q Could you see -- how far on Twenty-First Road could you see?

A I can see all the way down to Utopia Parkway.

Q Can you see portions of Utopia Parkway?

A Well, a minimum amount of space.

Q Now, while you were on the telephone with Miss Guze, did you look out the window?

A Yes.

Q What, if anything, did you observe?

A I saw a gray Cadillac go by on Utopia Parkway.

Q And could you approximate the speed?

A It was going pretty slow. I don't really know.

Q But it was going slow?

A Yes.

Q Do you recall how many times you saw this car go by?

A I'd say two or three times -- about two times.

Q And now, it was going, if you can recall, how was it going on Utopia Parkway? Tell us how it went?

A It went, the first time I saw it, it was going down Utopia Parkway past Bagel Stop, and the second time it came up Twenty-First Road and into the back of the store, into the parking lot.

Q It made a left on Twenty-First Road and then made a --

A Up to Twenty-First Road, right. And then it made a left into the parking lot.

Q Where did it go when you saw it?

A The parking lot in the back of the store.

Q Did you observe it after that?

A I don't remember seeing it after that.

Q You were having a conversation with Miss Guze while you were observing this car?

A Yes.

MR. SHANLEY: Your Honor, I'm anticipating.

THE COURT: Ask your question and I'll rule on it.

Q What did you -- what did Miss Guze say to you during this conversation?

MR. KESTNBAUM: Objected to.

THE COURT: No, I'll permit this. It's necessary to fix the time of the two observations that were being made and so that the jury can understand the transaction, if it was a transaction being viewed almost simultaneously by both witnesses.

You may proceed.

A She said there was a man looking around the store and he had the gray Cadillac, and she asked me if I saw it, and she said that he was going away. And then I had said, "I see the car."

Q What did you say?

A "I see the car."

Q And then what did she say?

A She said, "He came back again." And then she had said that there was a fire under the truck, that he was --

MR. KESTNBAUM: Your Honor, I object to that, if the Court please.

THE COURT: No, I'll let that in, as an exception, which I can explain to you in the abence of the jury, if you wish.

MR. KESTNBAUM: I except, sir.

Q Now, while this gray Cadillac was moving, there was a continuous conversation while you were observing the car, and you say it in your own words. When you saw the car, what did you say to Pat?

A I said, "I see the car. I can see it go by."

Q And then did there come a time in the conversation when she said something back to you?

A Well, she had said "It's --" I remember one time she said, "It's -- it's in front of the store," and then she said, "It's going away," and I had seen it then.

Q Then what did you say to her then?

A "I see it," the car.

Q So how long did this conversation about the car continue, if you can recall?

A I'd say about fifteen, twenty minutes, maybe.

Q And did there come a time when she -- I think you already testified that she told you that there was a fire?

A Yes.

Q What did you tell her then?

A Well, I told her --

MR. KESTNBAUM: Your Honor, I object to what was said at that point.

THE COURT: Well, what this witness told her, yes, I'll allow what the alleged observer of the fire said to this witness, but not what this witness said to the other.

Q What did Diane say to you about the circumstances surrounding the fire?

A What did Pat say to me?

MR. KESTNBAUM: Your Honor, I object to the way counsel is leading and suggesting. Before he had asked for a conversation without that. I think we should dispense with this leading.

THE COURT: Try not to lead the witness.

MR. SHANLEY: Yes, your Honor.

Q Did there come a time in the conversation when Diane said something to you, other than about the car moving around?

A When Pat said something?

Q I mean when Pat said something to you, other than her observations of the car moving?

A She had said that she sees someone looking around the store and looking in the windows, and then she said, "There's a fire under the truck." She had said that he was looking around the truck also, but then she said that there was a fire.

Q Was she -- withdrawn.

How long were you on the phone during this whole conversation, if you recall?

MR. KESTNBAUM: Your Honor, I object to the constant repetition. We have had that.

Q The whole conversation, if you can recall, how long were you on the phone?

A The first time I talked to her?

Q Yes.

A Yes, it was about fifteen or twenty minutes.

Q Now, could you tell the Court and jury, Miss Regan, as best you can recall the time when you made this phone call?

A About 1 o'clock.

Q Approximately or exactly or approximately?

A Well, she said, "Call me at 1 o'clock." So it

could have been a minute or two afterwards or before.

MR. SHANLEY: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Miss Regan, you recall this particular day quite clearly, don't you?

A Well, more or less.

Q And at that time, you were seventeen years old?

A Yes.

Q And you reached your seventeenth birthday?

A Yes.

Q What time did you get up that morning?

A I couldn't tell you that.

Q What time do you ordinarily get up?

A I'd say around 9, between 9 and 11, I usually get up.

Q What time do you ordinarily go to bed?

A Well, after work. That night it was 12 o'clock and I didn't get to bed until 1.

Q Did you work until 11 or 12?

A I worked till, I guess, it was 11, you know, 11, around there.

Q Isn't that what you told the jury before, 11?

A Yes.

Q You were tired then, weren't you?

A But she had asked me to call.

Q At 1?

A Yes, I waited.

Q She's a good friend of yours, wasn't she?

A Well, we got along very well.

Q Yes. You were quite close, weren't you?

A Yes, I guess so.

Q You had your own bedroom, didn't you?

A Yes.

Q Double bed?

A I shared the room with my sister, two single beds.

Q Two single beds. How many rooms to the apartment?

A There's -- on the second floor where I am, there's just two rooms.

Q Just two rooms?

A Yes.

Q There's the bedroom that you shared with your sister and what's the other room?

A My brother's bedroom.

Q What's downstairs?

A The living room, dining room, kitchen, another bedroom and bathroom.

Q Where would your folks sleep?

A Downstairs.

Q You had a cot for guests, didn't you?

A No.

Q You had no sleeping facilities for relatives, for guests?

A There was a couch in the living room that could have been opened up.

MR. SHANLEY: Your Honor, I would inquire as to the relevancy.

THE COURT: Well, the relevance is obvious. He may continue, unless you want me to explain it to you.

Go ahead.

Q Now, did she tell you why she was sleeping at the Bagel Stop that night?

A Yes.

Q What was the reason?

A That she had a fight with her parents.

Q With both parents?

A Well, she said with her parents. So --

Q What time did she tell you that?

A She had come into the store that night. So, maybe around 9 o'clock.

Q Is that when she came in, about 9 o'clock?

A I really don't know.

Q Well, could it have been 10 o'clock or 11 o'clock?

A It could have been.

Q Could it have been 6 o'clock?

A I don't know. I don't remember what time she had come in that night. She wasn't working. She just came in.

Q She wasn't employed at Bagel Stop?

A She was employed, but she wasn't working that night. She had just come in.

Q Let me understand that. Was she employed by Bagel Stop on July 17th?

MR. SHANLEY: I don't think the witness can answer this question.

THE COURT: She can try if she knows.

A I think so, yes.

Q What did she do there then?

A She sold bagels and worked the cash register.

Q Do you know if she was working on July 17th?

A I don't think she wasworking, no.

Q But at some time that evening, she told you she had had a fight?

A Yes.

Q With her folks?

A Yes.

Q That she was going to sleep over at Bagel Stop?

A Yes.

Q Did you see any night clothes in her possession?

A No.

Q Toothbrush?

A I wasn't really looking.

Q So you don't know if she had that?

A No.

Q Well, as a friend of hers, did you say, "Why don't you come over and sleep at my house"?

A We weren't that close for me to ask her that.

Q Didn't you tell us before you were good friends?

A We were good friends, but just working employees.

Q But you knew your friend was going to sleep

in this bakery all night, didn't you?

A Yes.

Q You knew that the door was going to be locked, didn't you? Is that right?

A Yes.

Q That was all right with you?

A Yes.

Q Did she ever tell you that she was staying over for security reasons?

A I don't understand what you mean.

Q Did she tell you that the boss had asked her to sleep over to look for vandalism?

A No, she didn't tell me that.

Q No reference to that at all?

A No.

Q You shared your room with a sister, didn't you?

A Yes.

Q How old was your sister?

A Fifteen.

Q Fifteen?

A Going on fifteen.

Q At 1 o'clock in the morning she was sleeping, wasn't she?

A Yes.

Q And you were good and tired, too, weren't you?

A Well, I was, I guess I was a little tired.

Q Your bed time is ordinarily 11 o'clock at night, isn't it?

A Well, it doesn't make a difference. One night it's 11, another night it might be 3 in the morning.

Q Didn't you disturb your sister while you were having this conversation?

A I don't remember her waking up. I --

Q Do you recall whether your sister was disturbed?

A No.

Q Did you care whether or not you were disturbing your sister?

MR. SHANLEY: Your Honor, how long can we go with this line of questioning?

THE COURT: Go to this question and that's it. Answer that question.

A No.

THE COURT: If you can.

Q You didn't care?

A No.

MR. KESTNBAUM: That is all. Thank you.

MR. SHANLEY: No redirect.

THE COURT: Thank you very much, ma'am. Next witness, please.

(The witness was excused.)

MR. SHANLEY: Your Honor, are we going to have a lunch recess? This might be a good time, your Honor. The Government -- the witness is here, but it's going to be a lengthy witness.

THE COURT: All right, if you would like to, we can break.

Be back, would you please, at ten after two. Don't discuss the case. Enjoy your lunch.

(The jury left the courtroom.)

THE COURT: Anything else, gentlemen?

MR. SHANLEY: I would like the record to show that the Government has been turning over 3,500 material. I would like your Honor -- we have been turning it over to the defense before the witness takes the stand in order to expedite the trial.

THE COURT: That's honorable.

MR. SHANLEY: At this time, I would like to turn over the next witness's 3,500 material, which

would be Mr. Reicher, and I would like it to be marked for identification at this time also.

THE COURT: Very good. All right, thank you, gentlemen.

MR. SHANLEY: Thank you, your Honor.

THE COURT: Do you have any requests to charge on behalf of the defendant, because I have received a brief on behalf of the Government. I'm in the midst of preparing my charge. Will we finish today?

MR. SHANLEY: No, your Honor.

THE COURT: Tomorrow morning?

MR. SHANLEY: I should be finished my case some time tomorrow.

THE COURT: Are you going to put the defendant on?

MR. KESTNBAUM: I haven't made up my mind yet.

THE COURT: How many witnesses will you have?

MR. KESTNBAUM: I don't know yet, your Honor. The way this case is going, I may have none.

MR. SHANLEY: If we could have a minute before the jury comes in this afternoon, counsel has been willing to stipulate as to some of the

business records.

THE COURT: All right. I'll see you at five after two then.

MR. SHANLEY: At this time, I'd like to have Grand Jury minutes dated July 29th, 1970, of Philip Reicher marked as Government's Exhibit 39 for identification.

THE CLERK: So marked as Government's Exhibit 39 for identification.

(So marked.)

(Whereupon, at this time a luncheon recess was taken until 2:10 o'clock p.m.)

AFTERNOON SESSION

(The trial was continued. The jury is not present.)

MR. SHANLEY: 3,500 material statement, dated July 24, 1970, two-page statement, marked as Exhibit No. 40 for identification.

THE CLERK: So marked as Government's Exhibit 40 for identification.

(So marked.)

MR. SHANLEY: General misdemeanor affidavit, one page, dated July 17, 1970, marked for identification, Reicher.

THE CLERK: Government's Exhibit 41 for identification.

(So marked.)

MR. SHANLEY: You have all this.

MR. KESTNBAUM: Yes.

MR. SHANLEY: Two -- three-page report of interview dated July 22, 1970, with Reicher.

THE CLERK: Forty-two, Government's Exhibit 42 for identification.

(So marked.)

MR. SHANLEY: One-page statement, undated -- I'm sorry, one-page report, reflecting an interview

on May 12, 1970.

THE CLERK: Government's Exhibit 43 for identification.

MR. SHANLEY: This date is wrong. That should be '71, not '70.

(So marked.)

MR. SHANLEY: One-page undated interview report with Reicher, by John Regan.

THE CLERK: Government's Exhibit 44 for identification.

(So marked.)

MR. SHANLEY: This is a three-page exhibit. It's obtained from the Han -- Manufacturers-Hanover Trust Company, pertaining to the Star of David Bagel Corporation.

THE CLERK: Government's Exhibit 45 for identification.

(So marked.)

MR. SHANLEY: Four photostats attached together of invoices, bearing the letterhead of Standard Milling Company.

THE CLERK: Government's Exhibit 46 for identification.

(So marked.)

THE COURT: Yes, you wanted to see me, Mr. Kestnbaum?

MR. SHANLEY: Your Honor, we premarked a number of exhibits on Friday, and Mr. Kestnbaum graciously at that time consented to their being -- some of these exhibits being marked into evidence. They are business records which would reflect sales and delivery of ingredients of bagels from New Jersey, to the 21-44 Food Corporation. He has indicated his willingness to stipulate and submit them into evidence. And I would like to know what the ground rules are, your Honor, if I could read portions of them to the jury?

THE COURT: Sure, you can treat them as evidence. Read them to the jury. Show them to the jury. Do whatever you wish with them.

MR. SHANLEY: I just have some more, Government's Exhibit No. 46 for identification, which is the same type of business record.

THE COURT: If he agrees, mark it in evidence.

MR. KESTNBAUM: I've agreed to all that, not graciously, but I've agreed.

MR. SHANLEY: And then with Government's

Exhibit No. 45, which is a record kept in the normal course of business by the Manufacturers-Hanover Trust Company, it reflects -- it's a signature card of the Star of David Bagel Corporation, and with the appropriate corporate resolution which allows Mr. Benjamin Schwartzberg to sign checks.

MR. KESTNBAUM: Yes, I have read it and it's all right.

THE COURT: Mark them all in evidence.

MR. SHANLEY: Government's Exhibit No. 45, and Government's Exhibit No. 46.

THE CLERK: Government's Exhibits 45 and 46 for identification are marked in evidence.

(So marked.)

MR. SHANLEY: Government's Exhibits No. 1, 2, 3, 4, 5, 6, 7, and 8, which were stipulated to by counsel on Friday has to be marked into evidence. I'd offer them into evidence now, also.

(The jury entered the courtroom.)

MR. SHANLEY: And also Government's Exhibit No. 9.

THE CLERK: Government's Exhibits 1 through 9,

inclusive, have previously been marked into evidence.

THE COURT: In your absence, in order to save time, both counsel have agreed that certain documents would be placed in evidence.

At the appropriate times, counsel will refer to them and have them passed among you.

Proceed.

MR. SHANLEY: Government calls as its next witness Mr. Philip Reicher.

P H I L I P R E I C H E R, called as a witness in behalf of the Government, being first duly sworn by the Clerk of the court, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Philip Reicher.

THE CLERK: Spell your last name.

THE WITNESS: R-e-i-c-h-e-r.

MR. SHANLEY: May I proceed, your Honor?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Reicher, how old are you?

A Thirty-one.

Q Are you married?

A Yes.

Q Do you have any children?

A Yes.

Q How many?

A Three.

Q Where do you live?

A 2723 Bell Road, South Bellmore.

Q Did you go to college, Mr. Reicher?

A One year.

Q Wherewas that?

A Oueens Boro Community.

Q Do you know the defendant, Mr. Benjamin Schwartzberg?

A I do.

Q How long have you knownhim?

A About seventeen years.

Q Will you point him out, please.

A Sitting next to the gentleman with the eyeglasses at the table.

THE COURT: Indicating the defendant.

Q What business is he in?

A The bagel and bialy business.

Q And the names of his companies?

A Star of David Bagels, Queens Bialy.

Q Where are they located?

A Melbourne Avenue and Main Street in Flushing.

Q Had you ever been over there?

A I worked for Mr. Schwartzberg.

Q How long was that?

A Fifteen years ago.

Q Now, are you a member of any union?

A Local 50.

Q What's that?

A It's a bread union, bread, bagels.

Q Local 50 of the American Bakery Confectionary Workers?

A Yes.

Q And what business are you in right now?

A The bagel business.

Q And you have a store?

A I have a store on 69th Road and Queens Boulevard, Forest Hills.

Q And what's that called?

A Bagel Stop.

Q You say that you are in the bagel business. Is it the retail business or wholesale?

A Retail and wholesale.

Q What do you sell?

A Bagels, bialys, doughnuts, diary, appetizing.

Q Now, Mr. Reicher, directing your attention to the year 1970, what business were you in then?

A The bagel business also.

Q And in January of 1970, what business were you in?

A I opened up 21-44 Food Corporation, which was a wholesale bagel bakery, retail. Same operation but a much bigger scale.

Q Where was that located?

A 21-44 Utopia Parkway, Whitestone.

Q Was there another store connected with that?

A I don't understand.

Q Well, did you operate another retail store?

A Well, I had Bagel Stop at the time.

Q Bagel Stop?

A Yes.

Q Was that located on the same premises?

A No.

Q Now, with regard to 21-44 Food Corporation, are you an officer?

A Yes, I was.

Q And you were an owner?

A Yes.

Q Were there other owners?

A Yes.

Q What were their names?

A Irving Teitler, Charles Naer, Steven Levy, and Eugene Steinberg.

Q What was your function?

A As an officer or as a --

Q What was your function in the business, what did you do?

A Well, I ran the business, basically. I produced bagels.

Q Is that -- withdrawn. How long did 21-44 stay in business?

A Approximately six months.

Q Now, what was the business of 21-44?

A Well, we went to 21-44 to build an enormous bagel wholesale business. We had a retail part of it. But that was secondary in our minds.

MR. KESTNBAUM: I didn't hear that.

THE COURT: Read the answer back.

THE WITNESS: We went to 21-44 --

THE COURT: Excuse me. Read the answer back,

please.

(The last answer was read by the court reporter.)

MR. KESTNBAUM: Thank you, your Honor.

Q Now, did you make or buy bagels?

A We manufactured them on the premises.

Q How about the bialys?

A We purchased them.

Q Now, how many bagels a week did you manufacture?

A Ten thousand dozen.

Q Ten thousand dozen. And could you approximate the gross dollar value of bagels that you manufactured a week?

A Six thousand dollars.

Q Now, Mr. Reicher, just what is a bagel?

A A bagel consists of high gluten flour, water, salt, malt, and yeast.

THE COURT: What was the last ingredient?

THE WITNESS: Water, salt, malt, and yeast.

THE COURT: Thank you.

BY MR. SHANLEY:

Q Can you make bagels yourself?

A Yes, I can.

Q Now, those are the ingredients that go into them; is that correct?

A Yes.

Q Now, in the normal course of your business, when would you make these bagels?

A We'd manufacture all day. We'd come in at 6 in the morning and manufacture the day's work until it was done.

Q And how long would that take?

A Approximately eight hours.

Q Were there people who manufactured at night?

A On the weekend we had a crew.

Q Now, you testified as to flour. Do you recall who you purchased your flour from?

A Standard Milling Company.

Q And approximately how many bags of flour would you purchase a week?

A Well, we went through a hundred bags very week. We manufactured a hundred bags a week, and we always had extra. Some weeks we bought one fifty bags to override into the next week.

Q How big were these bags?

A Hundred pounds weight.

Q Is there any particular ingredient in the flour, you said -- is there a bagel flour? Is this flour a bagel type flour?

A Well, it's high gluten flour. It's a special flour.

Q Do you recall the trade name of that, the Standard Milling --

A It's Pep. It's called Pep, that's their brand name, P-e-p.

Q Now, you also said you used malt; is that correct?

A Yes.

Q And where did you buy your malt from?

A Malt Diastis.

THE COURT: Could you spell it.

THE WITNESS: D-i-a-s-t-i-s.

A It's a subsidiary of Ma-Pac.

Q How would that come to you?

A In drums; it was a liquid.

Q Then you testified as to poppy seed?

A We used poppy seeds in the production of bagels. They weren't an integral part of the bagel; it's in the manufacture. It was for taste. It was a poppy bagel, like a salt bagel.

Q How did the poppy seed arrive?

A Poppy came from Ma-Pac also.

Q What kind of container?

A Poppy seeds came in a burlap bag. Poppy comes from Turkey.

Q Now, did you use a flour called Ardex 550?

A Yes.

Q And what function is Ardex 550 play in the making of a bagel?

A Ardex kept the bagel, the sugar from spraying from the flour. It kept moisture in the bagel. If the bagel stayed in the retarder or freezer a long time, the separation would cause enormous pimples and the bagel would look horrible.

Q In your operation, would you consider that essential?

A Yes.

Q Where did you purchase your Ardex 550?

A Through Staple Trading.

Q Where did they deliver to you from, if you know?

A New Jersey.

Q Now, Mr. Reicher, in regard to the 21-44 Food Corporation -- questions and answers will be

directed as to that corporation and events that happened. How many employees did you have, if you can recall?

A Approximately fifteen.

Q Could you name some of them?

A Darryl Steinberg, Rick Fisher, Steve Sternman, Diane Regan, Pattie Guze, Joy Leonard.

Q Now, who, if anybody, was unionized in this operation?

A Myself and Darryl Steinberg.

Q Now, what were your hours?

A Well, I came in at 6 in the morning, and I worked until the work was finished. That could be 7 or 8 o'clock at night, sometimes 10 o'clock at night, seven days a week.

Q Now, did you have any vehicles?

A We had a step-van, an International step-van.

Q What was -- what did that look like, describe that to the Court and jury?

A It was a ten-foot load area where you could store your, you know, your bagels, and we had a cab where the driver sat. In the back we had special racks because we transported frozen bagels raw to an account -- well, to two accounts.

Q And did it have any, any signs on it?

A The lettering said "Bagel Stop, World's Largest Bagel Bakery, Wholesale and Retail," and the telephone number.

Q What did you use the step-van for?

A When we delivered baked bagels and we delivered raw frozen bagels.

Q Now, when you got going in the business, how many routes did you have?

A We had a Queens route, a Bronx route, and Yonkers route.

Q And what time --

A We had a Nassau route also.

Q What time did these routes go out?

A We had a Nassau route also.

Q Pardon?

A Nassau route also.

Q What time would the deliveries be made on these routes?

A Nassau route was night route, twelve o'clock midnight it went out. Bronx, Nassau, and Queens went out 6:30 in the morning.

Q You mentioned Steven Sternum as one of your employees. How long, do you recall, that he

worked for you, for 21-44?

A I --

Q Did he work in the spring and summer?

A He worked about three months.

Q What was his job?

A He was the driver for the Nassau route.

Q Now, how many times a week would these deliveries be made?

A Well, basically, seven days a week. We had accounts open on Sunday also. But the supermarkets which were the Nassau route, went out six days a week. All supermarkets were six days a week. Some accounts --

Q There were certain accounts you delivered on Sundays also?

A Sunday, yes.

Q Now, with regard to these accounts which your 21-44 Corporation did business with, when you started, how did you get these accounts?

A We went out and solicited them.

Q Now, do you recall some of the names of some of the accounts?

A We sold Food Fair, Big Apple, Shop Rite, Sarows, Levy's, Waldbaum's.

Q And the geographic area covered by these

accounts was what?

A Again, Nassau, the Bronx, Yonkers, and Queens.

Q Now, during the year 1970, Mr. Reicher, what company was Mr. Schwartzberg operating?

A Star of David Bagels and Queens Bialy.

Q Now, directing your attention to the early part of 1970, in the spring or late winter or spring, did you consider Mr. Schwartzberg to be a competitor?

MR. KESTNBAUM: Objection to what he considered, your Honor.

Q Well, was Mr. Schwartzberg a competitor of yours in the early months of 1970?

A Every bagel bakery was a competitor of ours.

Q Did you -- while you were operating 21-44 Food Corporation, did you buy anything from Mr. Schwartzberg?

A Yes, we bought bialys from him.

Q And what would you do with these bialys after you bought them?

A We would sell them over the counter in the store and we would sell them to the supermarkets.

Q Did there come a time when you stopped?

A Yes, July 1st, we stopped doing business with

Mr. Schwartzberg.

Q Did you have occasion to observe the bialys prior to your stopping business?

A Well, the reason we stopped, the merchandise was mixed. We had some old bialys with fresh bialys, and we were getting complaints.

Q So the product was --

A Well, the product wasn't the product that we had made the deal for.

Q You testified that Waldbaum's was an account. Do you recall when you started doing business with Waldbaum's?

A Well, we received three Waldbaum's in March, from a Mr. Morris Pit, he's the supervisor of the appetizing of Waldbaum's.

Q Do you recall the names of these accounts?

A Well, the numbers of the stores. Store number 44, 78, and 87.

Q Where were they located?

A Bronx and Yonkers.

Q Do you recall how much you charged for these bialys?

A Fifty-five cents a dozen.

Q That was for the bagels.

A For Bagels and Bialys.

Q How did you service these stores?

A Daily.

Q And what billing procedures would you use to obtain payment from the Waldbaum Stores?

A When the store was delivered every day, we gave a slip and they signed a slip and the slips were brought to the office, and the bookkeeper entered them daily. At the end of the week, she made up a weekly statement. One was kept by us and one went to the store.

Q What was the bookkeeper's name?

A Joan Goodman.

Q Under whose supervision was she?

A My own.

Q Now, did there come a time in June, Mr. Reicher, that you obtained other accounts?

A Well, I had a meeting with Mr. Morris Pit, again, and we sat down and we negotiated ten new Waldbaum's. We received five Waldbaum's in Queens and five Waldbaum's out in Nassau.

Q Now, do you recall the numbers of the Waldbaum accounts that you received in Queens?

A Store number 41, store number 91, store number 53,

store number 58, and store number 55.

Q Do you recall the price that you agreed on?

A We negotiated a price of forty-eight cents a dozen for six months, and then it would go to fifty-five cents a dozen.

Q These were five Queens accounts; is that correct?

A Yes.

Q Whose accounts were they before they were yours?

A Mr. Schwartzberg's.

Q How did you find that out?

A We were told by Mr. Morris Pitt that they were Mr. Schwartzberg's.

Q In the industry itself?

A We know who the -- yes, we knew whose accounts were who.

Q Isn't that more or less common practice to know whose --

A Yes, if you want an account, you find out who's serving it.

Q Do you recall when you started servicing these accounts, these Queens accounts which you've

testified to?

A About the 5th of July, 6th of July. Right after July 4th weekend.

Q Were these five accounts, what was the weekly bagel volume that you were doing with them?

A They were doing a thousand dozen, which was a small figure because it was the summer, and people go away in the summer.

MR. KESTNBAUM: Your Honor, may we have responsive answers instead of speeches? The question was what the amount of business that was done, and I move to strike the answer out.

THE COURT: Denied.

Q Yes, please try to restrict your answers to my questions, Mr. Reicher.

Could you equate the thousand dozen a week to dollars and cents?

A Five hundred twenty dollars.

Q Were there also bialys involved?

A Yes.

Q What percentage bialys as to bagels?

A Ten per cent.

Q Ten per cent what?

A Ten per cent of the bialys. One hundred dozen a

week was the bialy total.

Q Now, focusing your attention on the early part of July, you were selling bialys. Did you make bialys at that time?

A We -- we negotiated a new deal with S & S Bagels out in Massapequa and we received them daily.

Q Who owns S & S Bagels, Massapequa?

A Well, Martin Schwartzberg and Stevey Saperstein.

Q How long did you continue buying bagels from S & S?

A Bialys.

Q Excuse me, bialys.

A Well, we didn't buy them too long. They called us up and told us they couldn't service us.

MR. KESTNBAUM: Objection to the question, your Honor.

Q How long did you buy from them?

A We couldn't buy from them -- approximately two weeks we were doing business with them and then we were stopped.

Q Well, from whom did you buy bialys at that juncture?

A We weren't allowed to purchase bialys from anybody. Every bakery we called wouldn't do business

with us.

Q So what did you do?

A Well, Mr. Steinberg, Darryl Steinberg, started making them and I helped him every day.

Q And how long did that last?

A Approximately a week.

Q Were you -- withdrawn.

When did he make those, when did he make the bialys?

A Well, the doughs were made approximately 4 o'clock in the afternoon to 4:30, and they went until about 7:30. We really baked as much as we needed and that really set the schedule back on the baking of bagels.

Q Well, how was your operation affected by this, baking your own bialys?

A Well, it became chaotic.

MR. KESTNBAUM: Objection to that, your Honor.

THE COURT: Objection to what?

MR. KESTNBAUM: The question and the answer, "How was your operation affected by this?"

"Answer: It became chaotic."

THE COURT: Yes, try to get a more specific answer from the witness, please.

Q Were you able to continue the normal functioning of making bagels while you were also making bialys?

A No.

Q Mr. Reicher, you've testified as to your billing procedures and how you would bill Waldbaum's.

I hand you Government's Exhibit No. 11 for identification. I ask you to take a look at that.

(Handed to the witness.)

Q Now, would you read -- do you recognize it?

A Yes.

Q What is it?

A It's a statement to Waldbaum's.

Q Whose letterhead is on the top?

A Bagel Stop.

Q And on the front is there a date?

A 7/27/1970.

Q And is there a -- what's written by Waldbaum's?

A Waldbaum's Store No. 41.

Q Do you recognize the handwriting on that?

A Yes.

Q And will you flip through those other pages which are thirteen in all with that exhibit. Do

you recognize the documents which are attached?

A Yes.

Q Is there another statement attached to that?

A Yes.

Q What's the date of that?

A July 13 -- July 20th.

Q And what also are attached to those statements?

A The route slips.

Q Now, those statements with the attached route slips, are they -- withdrawn.

Those statements, are they prepared in the normal course of business?

A Yes, they are.

Q Under your supervision?

A Yes.

Q And what happens to -- what happens to the copies of those statements?

A Well, we keep copies in our files and a statement is sent out to Waldbaum's.

Q And then you get paid, hopefully?

A Yes.

Q And in the ordinary course of business, you

would keep those records that you have there?

A Yes.

Q Did you keep the records in the course of the business?

A Yes.

Q Now, that whole exhibit for identification, No. 11, Mr. Reicher, is that accurate?

A Yes.

Q What does that exhibit reflect?

A Business that was.

Q In total?

A Excuse me?

Q Reflect.

A Business that was done with Waldbaum's.

Q Any particular store?

A Well, Store No. 41. Store No. 41.

Q And directing --

MR. SHANLEY: I offer this in evidence, your Honor.

THE COURT: Any objection?

MR. KESTNBAUM: May I see it?

(Handed to Mr. Kestnbaum.)

MR. KESTNBAUM: No objection.

THE COURT: Admitted.

THE CLERK: Government's Exhibit 11 for identification marked in evidence.

(So marked.)

BY MR. SHANLEY:

Q Mr. Reicher, on the front page of Government's Exhibit No. 11, which is dated July 27th, what is the last date on that sheet?

A July 25th.

Q That indicates the delivery on that day?

A Yes.

Q I hand you --

THE COURT: Show them all to counsel.

MR. SHANLEY: Counsel has seen these before, your Honor.

THE COURT: Any objection?

MR. KESTNBAUM: No objection, your Honor.

THE COURT: All right, mark them all in evidence.

MR. SHANLEY: I offer 14, 13, 12, and 15 into evidence.

THE CLERK: Government's Exhibits 12, 13, 14, and 15 for identification, marked in evidence.

(So marked.)

MR. KESTNBAUM: Your Honor, I'm going to

object to these proposed exhibits. They relate to other stores than those that have been testified to.

THE COURT: May I see them.

MR. KESTNBAUM: They are in noways connected with the defendant. They are not connected with the defendant.

MR. SHANLEY: Your Honor, the five stores are listed on there also.

MR. KESTNBAUM: With other stores.

THE COURT: I don't see how we can avoid that. Admitted.

THE CLERK: Government's Exhibits 16 and 17 for identification, marked in evidence.

MR. KESTNBAUM: May I have a voir dire on that?

THE COURT: Of course.

MR. KESTNBAUM: Now?

THE COURT: Yes.

MR. SHANLEY: I don't know whether the witness has seen those yet. I don't think he knows which ones they are.

VOIR DIRE BY

MR. KESTNBAUM:

Q Sir, will you look at Government's Exhibits 16 and 17. Those relate in part to stores that the defendant had served; is that right?

A Excuse me?

Q Those exhibits refer to stops that had been served in part by the defendant's corporation, do they not?

A Yes.

Q They also refer to other stops that he had nothing to do with; is that also correct?

A Yes.

MR. KESTNBAUM: Your Honor, I renew my objection. And I believe the exhibits should be limited to matters --

THE COURT: Well, we can't separate a document physically. If they are billing some of these stores which was served by the defendant and some which were not, the Government is entitled to put in the entire exhibit.

The jury will be informed that only some of these stores are connected with the defendant. I don't see how we can rewrite these exhibits.

MR. KESTNBAUM: All right.

THE COURT: Proceed.

MR. SHANLEY: Thank you, your Honor.

THE COURT: You understand, ladies and gentlemen, that just because I allow exhibits to go into evidence, doesn't mean that I think you ought to find that they bear on the defendant's guilt or innocence. That's for you to decide. All I'm ruling is that you may consider them.

DIRECT EXAMINATION

BY MR. SHANLEY: (Cont'd)

Q Mr. Reicher, I hand you a Government's Exhibit in evidence, 12, 13, 14, and 15.

(Handed to the witness.)

Will you examine them. Look through them and I direct your attention to the front page of each exhibit in which it says the name of the store to which you are billing.

What are the number of those stores?

A Store No. 45, 48, 49, and number 91.

Q Where are those stores located?

A Store number 45 is Kassena Boulevard.

Q Just in the general vicinity.

A In Queens.

Q Whose stores were they before you started servicing?

A Mr. Schwartzberg's.

Q And these, each one of these exhibits, represent your billing, the delivery and billing of Waldbaum's for servicing of those stores?

A Yes.

Q And you'll notice, Mr. Reicher, that the date of these, the top statement on each one of these four exhibits, 12, 13, 14, and 15, has the date 7/27/70; is that correct?

A Yes.

Q And the last date of delivery recorded on this statement, on each one of these statements, is July 25th; is that correct?

A Yes.

Q Now, Mr. Reicher, I hand you Government's Exhibit No. 16 and 17 in evidence, and ask you, are the five stores which you have testified to in Queens, are they on these Exhibits also, written in on the statement?

A Yes, they are.

Q What's the total figure on Exhibit No. 16 in dollars and cents?

A Eight hundred forty-nine dollars.

Q And that would represent to your billing

to Waldbaum's for one week?

A Yes.

Q And the billing includes some stores which were formerly serviced by Mr. Schwartzberg and others which were not formerly serviced; is that correct?

A Yes.

Q With regard to Government's Exhibit 17, is that a fair statement also?

A Yes.

Q What's the figure there?

A Eight hundred sixty-five dollars and thirty-seven cents.

Q Thank you.

MR. SHANLEY: With your permission, I would like to hand one of these to the jury and have it passed around.

THE COURT: Yes.

MR. SHANLEY: Maybe it would be better if I passed a couple of them.

THE COURT: Give them to the first juror so we'll be sure that they all look at them.

Q Mr. Reicher, do you know Mr. Steve Saperstein?

A Yes.

Q Directing your attention to the year 1970,

did you have a conversation with Mr. Saperstein?

A Yes, I did.

Q Could you approximate the time of the year?

A Early summer.

Q In relation to your obtaining of the Waldbaum accounts, when was it, as best you can recall?

A Steven told me to watch my equipment.

Q Can you -- equate the conversation to the obtaining of the Waldbaum accounts, in other words, timewise.

THE COURT: Try to fix a date, a place, and who else was present if you can.

A It was early July.

Q Was this face to face or over the phone?

A Over the telephone.

Q Now, was there a conversation?

A Yes.

Q With Mr. Saperstein?

A Yes.

MR. SHANLEY: Your Honor --

THE COURT: A conversation with who?

MR. SHANLEY: I should perhaps make an offer of proof here.

THE COURT: You swallowed the last word.

A conversation with who?

MR. SHANLEY: Mr. Saperstein.

THE COURT: Of Waldbaum's?

THE WITNESS: From S & S Bagels. Mr. Saperstein from S & S Bagels.

THE COURT: Who called whom?

THE WITNESS: He called me.

THE COURT: Where did he call you?

THE WITNESS: He called me in the bakery.

THE COURT: Go ahead, ask him the question.

BY MR. SHANLEY:

Q Do you remember the conversation?

A Well, we took --

Q What did he say to you?

MR. KESTNBAUM: Objected to.

THE COURT: No, I'm allowing this in to show the state of mind of this witness at or about this time.

One of the issues before you is going to be whether the defendant caused the witness's company to give up accounts by threats or by violence and in determining that, you may have to consider the state of mind of this witness, and how he responded to acts, if any, of the defendant.

So, I'm allowing this conversation in to show, if you think it's helpful, what the state of mind of this defendant was at this time and not to show what acts were done, if any, by the defendant.

Is that clear?

MR. KESTNBAUM: I respectfully except. May I have the date again? I didn't hear it. The date of this alleged conversation.

THE WITNESS: Early July.

BY MR. SHANLEY:

Q What did he say to you?

A Well, he had said to me, now that we had taken the Waldbaum's away from Mr. Schwartzberg, to watch our equipment, the truck in particular, the delivery vehicles and anything in the store, that they may be bombed or the tires slashed or sugar poured into the gas tank.

Q Did he relate to you anything -- withdrawn. Did he tell you about any experiences he had had?

MR. KESTNBAUM: Your Honor, I object to counsel leading the witness at this time.

THE COURT: Yes. Please don't lead.

Q Was there any further conversation that you

recall with Mr. Saperstein about these things he warned you about?

A Well, he told us they will do it to our personal --

THE COURT: I can't hear you.

A He also told us they would do it to our personal cars also; to lock up the hoods and put locks on the gas caps also.

Q Mr. Reicher, you've been in the business for how long?

A Sixteen years.

Q Did you have occasion during the course of your time in the business to talk to people about Mr. Schwartzberg's reputation?

A Yes.

Q And what did they tell you about his reputation?

MR. KESTNBAUM: Your Honor, I object to that, to "reputation." Now, I object to it, sir.

THE COURT: Well, there's no way of avoiding it that I can see.

MR. KESTNBAUM: May I have a side-bar, your Honor?

THE COURT: Yes, I'll be glad to.

(The following side-bar conference ensued out of the hearing of the jury:)

MR. KESTNBAUM: Firstly, I think the Government is limited by its bill of particulars.

THE COURT: I don't have a copy.

MR. KESTNBAUM: I'll be glad to supply it.

THE COURT: Would you do so now, please.

MR. KESTNBAUM: Yes, your Honor.

(Whereupon, the side-bar conference out of the hearing of the jury then concluded.)

THE COURT: Why don't you take a few minutes relaxation in the jury room, ladies and gentlemen, because we might be discussing it.

(The jury left the courtroom.)

THE COURT: What is your offer of proof going to be here?

MR. SHANLEY: My offer of proof, your Honor, will be, this witness, along with other witnesses, knew of Mr. Schwartzberg's reputation in this business.

THE COURT: Which was?

MR. SHANLEY: Was a violent man who would even bomb and blow up bagel factories. He had a nickname "Benny the Bomber," and the Torch."

THE COURT: Who are you going to have testify?

MR. SHANLEY: This witness will testify and other witnesses will testify.

THE COURT: I don't want the other witnesses to testify what they -- only what they told this witness. I'm allowing this in to show this witness's state of mind.

MR. KESTNBAUM: Your Honor, I'll have the bill of particulars in a moment.

From the authorities quoted in the Government's brief, they quote Professor Wigmore, a recognized authority. Wigmore confines it to utterances. And in the Government's brief, they quote that. This has to be based on some solid foundation.

THE COURT: No, it depends on what this witness knew or believed about the defendant, and if other people were telling him about reputation or he or somebody in the trade knew about that reputation. You can inquire as to the basis for it or I'll make the Government make that query if you would like. That suffices. What we're interested in is whether this witness, as

a principal officer in the bagel company involved, that is to say, 21-44 Food Corporation, responded to defendant's activities by giving up these acts.

Now, whether he did, and it is reasonable to expect that he did, depends upon what he knew about the defendant's reputation.

MR. KESTNBAUM: Then I submit, your Honor, I should have been apprised of that in a bill of particulars.

THE COURT: I haven't seen it yet.

MR. SHANLEY: In Government's trial brief, your Honor, we do point out the reputation, the applicable law on reputation.

The bill of particulars -- this was not asked for in the first place.

THE COURT: Let me see the demands and let me see the bill. I can't talk about this in generalities. I want to see the specifications.

MR. KESTNBAUM: Your Honor, this is the motion for a bill of particulars.

(Handed to the Court.)

THE COURT: Well, where is the bill?

MR. KESTNBAUM: The Government's bill is

downstairs. Mine should be in my brief.

THE COURT: It's not in the file. It should have been filed.

MR. SHANLEY: There was no bill of particulars in this case, your Honor.

MR. KESTNBAUM: It was stipulated that this bill of particulars would cover the superseding indictment.

THE COURT: I don't have a copy.

MR. KESTNBAUM: There's no question that it was not covered.

THE COURT: I'd like to see it. This was a motion granted by Judge Rosling.

MR. SHANLEY: It was by consent, because I wasn't in the case at that time. It was a consent to a bill.

THE COURT: Let me see the Answer.

MR. SHANLEY: Your Honor, the agent has gone down to get my file. I do have a copy in my file, your Honor.

I would like to add, your Honor, this would be in the line of evidence, anyway, what the witness is going to testify to.

THE COURT: Let me see what the document

shows and then I'll rule.

(Pause.)

MR. KESTNBAUM: I have it, your Honor.

THE COURT: I think that the Answer is sufficiently responsive to the demand.

MR. KESTNBAUM: I think that is part of the extortionate plan. If the reputation of the defendant was part of it, I think it should have been set forth.

THE COURT: I don't believe so. I think it's sufficiently specific. Those are details of evidence which you know come in in a case like this. I believe you should have been prepared to meet them.

We'll take a few minutes and then continue. If you wish me to give an instruction to the jury with respect to the great dangers of a prosecution of this kind, because of this evidence coming in, I will do so.

We'll take five minutes.

(A short recess was taken.)

AFTER RECESS

THE COURT: Bring in the jury, please.

(The Government's witness, Philip Reicher,

resumed the witness stand.

MR. SHANLEY: May I proceed, your Honor?

THE COURT: No, I'm going to instruct the jury.

Now, as I explained to you at the outset, ladies and gentlemen, this is a serious case. What we have is a man charged with a felony. It's a very serious crime. I'm going to allow this witness and other witneses to testify with respect to what this witness knew about the reputation of the defendant.

The defendant is not being tried because of his reputation or because what he may have done or didn't do some years ago or at any time in the past. He's being tried with a very specific crime, namely, extortion of the type described here; that is, compelling by threats and by action the giving up of business by the corporation involved here.

And I'm allowing this evidence in only to show what the state of mind of this witness, and other people involved in that corporation were.

Do you understand? I recognize and you should recognize that it's highly prejudicial to

the defendant to allow this evidence in, because it may show or you may find that people didn't think much of him. I don't know what the evidence will show. That's not what he's being tried for. We don't try and convict people because they have bad reputation and/or may be considered by some people to be bad men. Only for specific acts, here extortion. And one of the elements is why this company gave up the Waldbaum accounts, if they did give them up, whether they gave them up out of fear and because of violent activities.

Is that clear on each of you?

As I told you at the outset, I don't want any remarks passed about any of the witnesses or bagels or anything else at any time. Keep your thoughts to yourself and keep an open mind until the case is completed.

Proceed.

MR. SHANLEY: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. SHANLEY: (Cont'd)

Q Mr. Reicher, did you have occasion from time to time to talk to people in the industry about the reputation of Mr. Schwartzberg?

A Yes.

Q What did they tell you about his reputation?

A He was an extremely violent man. If he lost an account to a competitor, and the competitor kept taking accounts away, one way or another he would get the account back.

Q Did they refer to him by any name?

MR. KESTNBAUM: Your Honor, can we have an identity of who they are?

THE COURT: Yes, be specific, if you can.

MR. KESTNBAUM: And times and places and people, your Honor.

THE COURT: Well, you may cross-examine as to that. But be specific, if you can.

Q Do you recall anybody in particular who told you?

A Darryl Steinberg, Eugene Steiberg, Norma Steinberg, Martin Schwartzberg, my father.

Q Now, did they refer in their telling you of the reputation of this man, did they refer to him by any name as part of his reputation?

A "Benny the Bomber," "Benny the Torch."

MR. KESTNBAUM: Again, your Honor, may we

have the person who so referred to him?

THE COURT: If you know or can recall now, please tell us.

THE WITNESS: All these people I mentioned.

Q On how many different occasions that you can recall were they mentioned, if you can recall?

A I really can't recall. It depended on the situations. Like after the bakery, after we gave up our store, it was throughout the industry.

THE COURT: I don't want to know what happened after.

THE WITNESS: If there was a fight in the industry for act --

THE COURT: I don't want to know about anything that happened after July of 1970.

THE WITNESS: Previous to it?

THE COURT: Yes.

THE WITNESS: I can't give a specific date, but the burning of the Triboro Bakery.

THE COURT: I don't want specific events. The jury will ignore that statement.

Proceed.

BY MR. SHANLEY:

Q Did these instances occur before the end

of July of 1970?

A Yes.

MR. KESTNBAUM: I object to the form of the question. There's no proof that any instances occurred, your Honor.

THE COURT: He's concerned about relations to the witness of reputation.

MR. KESTNBAUM: Yes, but the question relates to specific incidents.

THE COURT: No.

MR. SHANLEY: No, specific conversations.

MR. KESTNBAUM: Oh.

Q Could you approximate the number of conversations before the end of July, 1970, in which his reputation was discussed?

A Five or six times.

Q Now, Mr. Reicher, directing your attention again to July of 1970, did there come a time when you went to the store early in the morning and you saw something?

A Yes, on July 9th, I opened up my store and the windows were broken.

Q And what windows --

MR. KESTNBAUM: Just a moment. That I object

to as not emcompassed by the bill.

THE COURT: May I see the bill again.

We have this information in the case already through one of the witnesses. I think it's a legitimate question.

MR. KESTNBAUM: Your Honor, that was for the purpose of showing a conversation through an opening in a window.

THE COURT: No, she went further than that. The defendant is not charged with breaking these windows. Again, I'm letting this in only with respect to state of mind.

MR. KESTNBAUM: I respectfully except, your Honor.

BY MR. SHANLEY:

Q Now, what was this window that you observed?

A Front plate glass window.

Q Where was it?

A The front of the store.

Q Do you recall the approximate damage?

A Two hundred dollars.

Q Now, the following day, July 10th, did you go to the store on that day?

A Yes.

Q Did you observe anything upon your arrival?

A The door in the office, a rock was thrown through it about the size of a soft ball.

Q Did you have any conversation with anybody about that incident, about the rock being thrown through?

A Well, Mr. Schwartzberg came in --

MR. KESTNBAUM: Your Honor, I object to the answer as not responsive.

MR. SHANLEY: Withdrawn. I'll withdraw the question.

Q Did you see the rock?

A Yes.

Q And to your knowledge, do you know what time this rock was thrown through the window?

A Approximately 12 a.m.

Q To your knowledge, do you know whether anybody was in the store at that time?

A Darryl Steinberg was baking at the time.

Q Now, after you got to the store that day on July 10th, did you have any conversation with anybody?

A Well, Mr. Schwartzberg came into the store to collect an old bialy bill.

Q Did you have a conversation with him?

A Yes.

Q Where did you have the conversation?

A In the office where the door was broken.

Q Was there anybody present?

A Joan Goodman, my bookkeeper.

Q Did she remain present during the whole conversation?

A I told her to draw a check for Mr. Schwartzberg to pay him up to date, and she drew the check and she left.

Q Did the conversation continue?

A Yes.

Q As best you can actually give us, what did you say and what did Mr. Schwartzberg say?

A I had said to Mr. Schwartzberg that I was sorry I took the Waldbaum's away from him, but business was business and Mr. Schwartzberg came back at me with "This is your last gasp, kid."

And I said to Mr. Schwartzberg, "Benny, please, business is business." And he left.

Q What was your state of mind?

A It wasn't good. I was very nervous.

Q What did you think might happen?

MR. KESTNBAUM: Your Honor, object to what he might have thought.

THE COURT: Yes, I don't think you need that.

Q Were you aware of his reputation when you had that conversation?

A Yes.

Q After that conversation, did you -- who, if anybody, did you see in the office?

A Well, nobody in the office, but upon leaving the office, I met Steve Sterman, the driver, and he remarked to me that there goes the delegate from the driving union.

THE COURT: I can't hear you.

THE WITNESS: He remarked to me, "There goes the delegate from the driving union."

And I said, "That wasn't the delegate."

MR. KESTNBAUM: Your Honor, I object to this conversation.

THE COURT: Sustained.

THE WITNESS: I said to him --

BY MR. SHANLEY:

Q You had a conversation with Mr. Sterman?

A Yes.

Q Now, that day, did you have any further

conversations, did you have any conversations with any of your partners?

A Well, we talked it over among ourselves, my partner, Eugene, and I believe just Eugene and his son Darryl, and they were for throwing in.

THE COURT: Don't tell us. Go ahead.

MR. SHANLEY: Your Honor, may I inquire as to what Darryl Steinberg said?

MR. KESTNBAUM: I would object to it, your Honor. Questions are put. I don't know when, where, this happened.

MR. SHANLEY: This is the same day the witness has testified to.

MR. KESTNBAUM: I object to conversations among the partners.

MR. SHANLEY: The witness identified Darryl Steinberg as being there.

THE COURT: All right, I'll take this conversation. Again, only to show the state of mind of these persons so that you may, if you wish, draw inferences as to their actions and the reasons for them.

BY MR. SHANLEY:

Q Do you recall what Darryl said?

A Darryl wanted to give the Waldbaum's back, and Eugene also wanted to give them back, and I was adamant, I didn't want to give them back.

Q Why did Darryl want to give them back?

MR. KESTNBAUM: Objection to why he wanted.

THE COURT: Are they going to testify?

MR. SHANLEY: Darryl Steinberg is going to testify, your Honor.

THE COURT: All right, I'll take Darryl's statement. I'll assume you will produce him for cross-examination.

MR. SHANLEY: Oh, yes.

BY MR. SHANLEY:

Q What did Darryl say with regard to -- did he give you a reason why he wanted to give them up?

MR. KESTNBAUM: I object to counsel leading or asking for anything but conversations, if the Court please.

THE COURT: Yes, go ahead. Sustained.

Q Why -- did Darryl Steinberg say anything else, if you recall?

A He was afraid for himself.

Q Did he say that?

A Yes.

MR. KESTNBAUM: Object to the conclusion of the witness, if the Court please.

Q What did he say?

A He was afraid for himself. He was afraid of bodily harm.

Q He said that?

A Yes.

Q Now, this conversation took place in July 10th, I think you testified to. In the week that followed, did you have occasion to observe the windows in the 21-44?

A Yes.

Q And what did you observe about them?

A They were broken.

THE COURT: I don't understand. Fixed and broken?

THE WITNESS: Fixed and broken. Fixed and broken.

THE COURT: Go ahead.

BY MR. SHANLEY:

Q What was your state of mind when this was going on?

A I was very nervous and afraid.

Q Now, directing your attention to July, mid-

July of 1970, did there come a time that you received a phone call in the early morning?

A July 17. Morning of the 17th.

Q Do you recall receiving a phone call in the early morning in mid-July?

A Yes.

Q And pursuant to that phone call, where did you go? Subsequent to the phone call, where did you go?

A Back to bed.

Q And did you go -- did you receive a call -- withdrawn. Did you receive a -- withdrawn. Did there come a time when you made a visit to the premises of 21-44 Food Corporation early in the morning?

A On July 17th, I received two phone calls, one from Darryl Steinberg, asking permission to allow Patty Guze to sleep in the bakery, and I gave him permission, and I went back to sleep. And an hour or two or three later, I didn't observe the time, Patty called me and said that there was a man outside --

MR. KESTNBAUM: Object to what Patty told him.

THE COURT: Sustained.

Q Did you go down to 21-44?

A Yes, I went down to the store when Patty called me.

Q And from the store, when you got to the store, did you have a conversation with anybody?

A I had a conversation with Norma Steinberg.

Q And then subsequent to that, where did you go?

A I went to the 111th Precinct.

Q Did you see anybody in the 111th Precinct?

A I saw Mr. Schwartzberg in the jail cell.

Q Now, the following day or later that day, July 17th, did you go back to 21-44 Food Corporation?

A In the early morning, yes.

Q And what happened to the truck? Did you observe the truck?

A The truck was in front of the bakery.

Q Did it remain there?

A It was towed away to the pound.

Q Did you pay a visit to the district attorney's office that day?

A Yes.

Q Did you have any conversations?

A I instructed the district attorney --

MR. KESTNBAUM: Object to what he instructed.

THE COURT: Sustained.

Q Did you have a conversation and who with?

A With the district attorney.

Q What did he say?

MR. KESTNBAUM: Objected to.

THE COURT: Don't answer. Sustained.

Q Mr. Reicher, you learned on the 17th of July about what had happened early that morning; is that correct?

A Yes.

Q And subsequent to that day -- withdrawn. What was your state of mind after you learned of this incident?

A I was very frightened, frightened for my life already.

Q And did you talk with anybody about this?

A Well, on the 17th?

Q Well, at any time after the 17th.

A Well, we had -- I had a conference with my partners and we were all petrified already.

Q Now, did you remain in business for a while after the 17th?

A Yes.

Q Were you making deliveries?

A Yes.

Q And how were the deliveries going?

A How were they being delivered?

Q Yes.

A We rented a van.

Q And did there come a time in late July when you had a conversation with Darryl and your partners?

Well, maybe I'll rephrase the question. Did there come a time that you ceased operation?

A Yes.

Q Prior to your ceasing operation, did you have any conversations with anybody?

A Well, my partners wanted to give up. But I didn't. I was very adamant about that. I wanted to stay.

Q What was your state of mind?

A Well, I was a nervous wreck. I was frightened. I had a business that was going. I worked very hard and I wanted to keep it.

Q What did you ultimately decide to do?

A To close it.

Q Why?

A The truck that we had rented was no good. We

had special racks in it, on the truck, and I couldn't deliver frozen bagels any more. This was a big account. The truck was eating us up, it was costing us too much.

Q What else -- were you afraid?

A Yes.

MR. KESTNBAUM: Your Honor, I object to counsel persistently leading the witness and suggesting answers.

THE COURT: Don't lead the witness, please.

Q I'll ask you again, what was your state of mind prior to closing?

A Well, I was terribly afraid. I was terribly afraid right after the truck was blown up or attempted to be blown up, to do any kind of business. I didn't know what next. Every time I went down to the store, it was another: a window, a truck.

Q Did you talk to Darryl about this?

A Well, we discussed the fact, you know, what was going to be next.

Q What did Darryl tell you to do?

A He wanted to close.

Q Did you close?

A We finally closed, yes.

Q Now, during the period after the truck

incident on the 17th of July, did you receive any phone calls?

A Yes.

Q Who -- did the caller identify himself?

A No.

Q How many times did you receive these calls?

A Three or four times.

Q And what did the caller want?

A He wanted to speak with --

MR. KESTNBAUM: Objected to. Your Honor, an anonymous call unidentified after July 17th.

THE COURT: I'm going to sustain that. I'll explain my ruling, if you wish, after the jury has left.

Q Now, Mr. Reicher, did there come a time before you closed that you had a conversation with Mr. Morris Pitt?

A Yes.

Q And as a result, what did you tell Mr. Morris Pitt?

MR. KESTNBAUM: That is objected to.

THE COURT: This is after closing?

MR. SHANLEY: Prior to the closing, your Honor.

MR. KESTNBAUM: If it's subsequent to July 17th.

MR. SHANLEY: Subsequent to July 17th and prior to the closing in late July.

THE COURT: I don't think we need it. Sustained.

Q Do you recall the exact date that you closed operations?

A July 28th.

MR. SHANLEY: May I have one minute, your Honor?

(Short pause.)

MR. SHANLEY: Thank you, Mr. Reicher. Your witness, counsel.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q You pronounce your name Reicher?

A Reicher.

Q Your first name is Philip?

A Yes.

Q And was Miss Guze an employee of yours on July 17th?

A Yes.

Q She was on the payroll?

A Yes.

Q Have you discussed the case with her since July 17, 1970?

A Yes.

Q Did she state to you that she was on the payroll? Was that discussed?

MR. SHANLEY: I'll object to that, your Honor.

THE COURT: No, I'll allow it.

A Never came up.

Q Never came up?

A No.

Q Did you know that she was going to spend the night at your bagel store at Utopia Parkway on July 17th?

A No.

Q You never knew it beforehand?

A No.

Q When did you first learn of it?

A When Darryl Steinberg called me up.

Q What time was that?

A I have no idea. He woke me.

Q He woke you?

A Yes.

Q Where do you live?

A 2723 Bell Road, South Bellmore, Long Island.

Q That's about how far from Bagel Stop?

A Twenty-five miles.

Q But you had an apartment in close proximity to Bagel Stop, did you not?

A Yes.

Q Where was that apartment?

A On Fleet Street, F-l-e-e-t.

Q Is that near -- did you have an apartment on Woodhaven Boulevard?

A That's Fleet Street -- Woodhaven and Fleet Street.

Q That's in Forest Hills, is it not?

A No.

Q What area is that called?

A Woodside.

Q Is that the other side of Queens Boulevard from your Bagel Stop?

A Bagel Stop, Inc.?

Q Yes.

A Yes.

Q It's on the other side of Queens Boulevard from Utopia Parkway, isn't it?

A Well, I really don't know.

Q Well, about approximately how many miles

is it from Utopia Parkway, from your bagel store?

A Bagel Stop now?

Q I was referring to your store on Utopia Parkway.

A Approximately seven miles.

Q Did anyone but you occupy that apartment on Fleet Street?

A Yes.

Q Who else?

A Pattie was up there a couple of times.

Q She was -- she would sleep there from time to time?

A No.

Q What would she be doing there?

A She stopped off once or twice with myself.

Q My question was did anyone but you occupy it? Did she occupy it?

A When you say "occupy it," how do you mean? Did she walk into the apartment?

Q Use the apartment for living purposes.

A No.

Q You're the only one?

A Yes.

Q Did you say Pattie was there a few times?

A Twice, yes.

MR. SHANLEY: Your Honor, object to this line of questioning.

THE COURT: I can't hear you.

MR. SHANLEY: I'll object to this line of questioning.

THE COURT: No, overruled. It goes to the credibility and possible bias of the witness. I'll allow it.

Q Could you give the date of the two times she was there?

A No.

Q Were you there with her?

A Yes.

Q Anyone else?

A No.

Q On the first occasion, how long were you there?

A Approximately a half hour.

Q And on the second occasion?

A Same time.

Q Just you and Pattie. You were her boss, weren't you?

A Yes.

Q What did she call you?

A Philip. Mr. Reicher.

Q Which one, Philip or Mr. Reicher?

A Both.

Q Now, you did have a telephone conversation with her at the early morning of July 17, 1970, did you not?

A Yes.

Q She called you?

A Yes.

Q Did she tell you that there was a man about looking into the premises?

A She told me there was a man by the truck.

Q By the truck. Did you have another conversation with her after that, that night?

A I met her in the police station.

Q Before that, did you have another telephone conversation? Please reflect and try not to be hasty in your answering. Did you have another telephone conversation?

A No.

Q Did you call her back in the early morning hours?

A No.

Q Did you make a telephone call and find out what sort of a car the defendant Benjamin Schwartzberg operated?

A No.

Q Are you sure of that?

A Oh, I talked to Martin Schwartzberg, you're right.

Q Did he tell you what sort of a car the defendant operated?

A Yes.

Q That telephone conversation with Mr. Martin Schwartzberg followed the one that Patricia made to you; is that right?

A Yes.

Q Did you learn from Martin that the defendant owned a Cadillac car?

A No.

Q What did he tell you?

A He had a gray Cadillac.

Q Was there -- my question to you, sir, was did you learn from Martin that the defendant had a Cadillac car?

A My answer is no.

Q Do you quarrel with that?

A Excuse me?

Q Do you quarrel with that?

A My answer to that is no.

Q Oh, you didn't learn that from him?

A I learned the color of the car.

Q And the make of the car?

A No. I knew the make of the car. I learned the color of the car.

Q Then you called Patricia back, didn't you?

A No.

Q Well, what did you do after you learned that?

A Jumped into my car and went down to the bakery.

Q Had you spoke to Patricia?

A At the bakery?

Q Yes.

A No.

Q Was she there?

A No.

Q Did you have any other telephone conversation with Patricia that morning?

A No.

Q Now, I think you said that you worked for the defendant Schwartzberg?

A Excuse me?

Q You had worked for him?

A Yes.

Q Incidentally, where you mentioned the defendant, in competition with the defendant, you know he had a corporation, don't you?

A Yes.

Q And that he was an officer of a corporation?

A Yes.

Q Just as you were an officer of 21-44 Food Corporation?

A Yes.

Q You know that. Well, how long ago did you work for him?

A I was fourteen and a half years old -- approximately seventeen years.

Q What did you do for the defendant's company?

A I packed, I swept floor, cleaned up. I sold bialys.

Q Were you treated fairly?

A In regards to wages or just work?

Q In regards to everything.

A No.

Q What was your complaint?

A I worked the night shift and I really didn't receive the wages I should have.

Q That was your only complaint?

A My only complaint.

Q Did the defendant work in his bagel store at that time? Was he a working boss or an executive boss?

A I don't know.

Q Well, you were there, weren't you?

A Oh, when I worked for him?

Q Yes.

A Oh, he was a working boss then.

Q He worked long hours, didn't he?

A I never watched his hours. He was the boss.

Q But you saw him around?

A Yes, he worked.

Q You saw him working, didn't you?

A Yes.

Q Did you know whether he worked for a long time each day or a short time?

A No, I don't. I didn't watch his hours. It wasn't my business to watch his hours.

Q In any event, leaving that for a moment. There came a time when you and three partners formed

21-44 Food Corporation; is that right?

A Yes.

Q Did you have your place of business on Utopia Parkway at Whitestone in Queens; is that right?

A Yes.

Q And you put on your truck that you were the largest bagel operation in the country; is that right?

A Yes.

Q Was that true?

A I believe so.

Q Do you know?

A I believe so.

Q But you don't know?

A No.

Q And business was going along fine, wasn't it? You were doing very well?

A No, we weren't.

Q Oh, you weren't?

A Not at the beginning.

Q But you were doing very well at the end, weren't you?

A Yes.

Q By the end, you mean July of 1970?

A Yes.

Q You had plenty of money and you were paying all your bills then?

A No.

Q What do you call doing well, sir?

A We started to build, build business. We were doing $9,000 a week. At the beginning we were doing nothing. Now, the first year of a business is the hardest. Nobody says we went in like a tiger. I'm not saying that. We started to build accounts. At the end, we had fifty something accounts.

Q Yes.

A Major accounts.

Q Did you do business with Standard Milling Company?

A Yes.

Q In the Empire State Building?

A Yes.

Q I show you --

MR. KESTNBAUM: May I have this marked for identification?

THE COURT: Yes.

THE CLERK: Defendant's Exhibit A for identi-

fication.

(So marked.)

Q I show you Defendant's Exhibit A for identification, and I ask you whether you recognize it?

(Handed to the witness.)

A I recognize it in the fact that it's a statement from Standard Milling.

Q To your firm?

A Yes.

Q And does it truly reflect the activity between the mill and your firm?

A I really can't remember it.

Q But you received such a bill, didn't you?

MR. KESTNBAUM: I offer it in evidence, if the Court please.

THE COURT: Admitted.

THE CLERK: Defendant's Exhibit A for identification, marked in evidence.

(So marked.)

Q Now, sir, you noted from this exhibit, Defendant's Exhibit A in evidence, that on June 17th you owed this firm $656.80; is that right?

A Let me read the statement?

Q Just take my word for it.

A Okay.

Q Then on June 10th, there's an entry "N.S.F." check, making the amount of $800.

A Yes.

Q Will you tell the Court and jury what that means?

A No sufficient funds.

Q Now, that's toward the latter part of June, 1970?

A Yes.

Q That's when you were doing so beautifully?

A I didn't say we were doing beautifully. We were starting to build.

Q You were issuing no good checks, weren't you?

MR. SHANLEY: Objection, your Honor.

THE COURT: I'll allow it.

Q Is that right?

A We issued checks. We didn't issue it with the idea it wouldn't be good.

Q Well, didn't you know whether you had funds to cover when you issued checks?

MR. SHANLEY: Object to the form of the

question, your Honor; argumentative.

THE COURT: I'll allow it.

A There were funds in the account. If another check came in; I had five partners.

Q Do you know who signed this particular check?

A No, I don't.

Q Among your partners or you, it was known that some of your checks were drawn without funds to cover; is that right?

MR. SHANLEY: Object to that question, your Honor; calling for a conclusion or state of mind for four other people.

THE COURT: If he knows. He was an executive officer.

A There was three other partners involved and they had the power to sign checks without me.

Q Did you know of your own knowledge checks that were drawn without sufficient funds?

A No.

Q Is that so?

MR. SHANLEY: I'm going to ask counsel to refrain from commenting on answers of the witness, also.

THE COURT: Yes, please do.

MR. KESTNBAUM: I will withdraw the comment, your Honor.

THE COURT: Thank you.

MR. KESTNBAUM: May I have this paper marked as an exhibit?

THE CLERK: Document marked as Defendant's Exhibit B for identification.

(So marked.)

Q Now, sir, I show you Defendant's Exhibit B for identification and ask if you can identify it?

A Well, this is a statement to Star of David Bagels from the bank.

Q Relating to what?

A Insufficient funds.

Q Of whom?

A Star of David Bagels.

MR. KESTNBAUM: I offer it in evidence, if the Court please.

MR. SHANLEY: I don't understand. I have no objection, your Honor. I would object to the relevance of it.

THE COURT: If you are not objecting --

MR. SHANLEY: I wouldn't object, your Honor.

THE CLERK: Defendant's Exhibit B for identification, marked in evidence.

(So marked.)

THE COURT: May I see it, please.

MR. KESTNBAUM: Sir, perhaps I should have shown the other exhibit to your Honor also. This is in evidence.

(Handed to the Court.)

BY MR. KESTNBAUM:

Q Now, you knew from Defendant's Exhibit B in evidence that 21-44 Food Corporation issued a check to the defendant-corporation in June of 1970 in the sum of $62.60, and that that was returned for insufficient funds; you know that now, don't you?

A I know it now.

Q You didn't know it before now?

A I may have known it, I don't recall.

Q Well, search your memory and tell us whether you recall it.

A I don't recall it.

Q Now, didn't you testify that the defendant, Benjamin Schwartzberg, was in your place of business to collect some money that was due him?

A Yes.

Q And you knew about it, didn't you?

A Definitely.

Q You knew about it because you had signed the check which was returned for insufficient funds; isn't that right?

A I signed the check. I don't recall if it was returned or not.

Q And after viewing Defendant's Exhibit B, do you recall whether it was returned?

A I accepted that it was returned. I still don't recall it.

MR. SHANLEY: Your Honor, there's a date. I would ask counsel to say the date on that check.

MR. KESTNBAUM: I have given it. I would be glad to repeat. The date on this notice is 6/24/70.

MR. SHANLEY: Your Honor, As I recall the conversation the witness testified to, took place on July 10th. This notice is quite before that, and I would ask your Honor, I would suggest that any attempt by counsel to link this bounced check with the conversation on July 10th is inappropriate.

THE COURT: It's introduced and I'll allow the circulation of the document, and argument can be made at the close of the case.

BY MR. KESTNBAUM:

Q Now, sir, you had said early in my cross-examination that you weren't aware of any bad check to the defendant's company until now.

You want to correct that statement, don't you?

A I said to you I didn't dispute the check, that it came back. I'm just saying I don't recall it.

Q When the defendant was into your place of business in July, he brought along with him a no good check of your firm, didn't he?

A I don't recall that.

Q You don't?

A No.

Q Well, did you pay him that amount?

A I paid him a balance due on what we had purchased up until July 1st. I don't know if it was for this check or it was for the goods sold to us up until July 1st.

Q Did you get the check back when you paid him the balance?

A The check on July 10th?

Q Did you get the check referred to in Exhibit B, Defendant's Exhibit B, did you get that back?

A Personally, no.

Q Do you know whether anyone in your firm got it back?

A No.

THE COURT: I have a Grand Jury waiting to hand up some presentments as well as some sentencing matters.

Whenever you find it appropriate to stop, you may do so.

MR. KESTNBAUM: I'll stop right now, your Honor.

THE COURT: Now, ladies and gentlemen: We'll break, I'm going to have some business again in the morning. I hope to have it completed by 11 o'clock. But you may have to wait in the jury room until I finish. So, try to be here promptly at 11, even though you may have to sit around and wait a while.

Do not discuss the case. Keep an open mind, and the last person who receives that

document will get it back to him and you can continue to circulate it. Good night, have a pleasant evening.

(Whereupon, the trial was adjourned until Wednesday, September 19, 1973, at 11 a.m.)

THE WITNESS: Am I excused?

THE COURT: Yes, be here tomorrow at 11 o'clock.

THE WITNESS: Who gets these?

THE COURT: Gentlemen -- give it to the clerk.

MR. SHANLEY: Your Honor, may I just take one minute?

THE COURT: Since I have not yet received requests to charge, I have drafted in rough form a proposed charge which is now being Xeroxed. If you wait a few moments, my law clerk will give each of you a copy of that so you will have ample time to reflect on it. I will discuss it with you before the charge tomorrow. What I would like is very specific statements from you about how you want it modified, if at all.

Yes?

MR. SHANLEY: In that case, your Honor, I have requests for charge.

THE COURT: No, it would be helpful if I can study them.

MR. SHANLEY: I would submit them to the Court at this time.

THE COURT: Mark them as Court's exhibits.

THE CLERK: Government's requests to charge is marked as Court's Exhibit 1.

(So marked.)

THE COURT: All right. If you wait a little while, he will present it to you.

Good night, gentlemen.

(The trial was adjourned until Wednesday, September 19, 1973, at 11 a.m.)

—

Brooklyn, N. Y., September 19, 1973.

(The trial was continued.)

THE COURT: Bring the jury in, please.

(The jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen.

MR. SHANLEY: I apologize, your Honor.

THE COURT: That's quite all right.

Where is the witness?

MR. SHANLEY: He's coming in.

THE COURT: All right.

P H I L I P R E I C H E R, previously called as a witness in behalf of the Government, resumed the witness stand and testified further as follows:

THE WITNESS: Good morning.

THE COURT: You are still under oath, sir.

Proceed, please.

CROSS-EXAMINATION

BY MR. ..ESTNBAUM: (Cont'd)

Q Now, Mr. Reicher, your firm started doing business beginning of 1970, did it not?

A Yes.

Q And it finished its half year on June 30th of 1970; is that correct?

A Yes.

Q Did you have an accountant for the firm?

A Excuse me?

Q Did you have an accountant for the firm?

A Yes.

Q Certified Public Accountant?

A No.

Q Did your accountant issue statements?

A I believe so.

Q Do you have those statements?

A I'm not aware if I do.

Q Have you seen them?

A I don't know if we had statements.

Q I asked you if you have seen statements?

A No, I haven't.

Q You never saw them?

A I saw statements. But you're talking about a half year statement?

Q Yes.

A I haven't seen those statements.

Q That would tell the financial condition of the company at the end of June, 1970, wouldn't it?

A Yes.

Q As the executive officer of your company,

were you interested in seeing the statement of your accounting?

A Yes and no.

Q That's -- yes and no? Thank you.

That statement would reflect the money that was owing by the company, wouldn't it?

A Yes.

Q And your company did owe money, didn't it?

A Definitely, yes.

Q It was in the red, wasn't it?

A Yes.

Q You were going broke, weren't you?

A No.

Q Well, your liabilities were more than your assets, weren't they?

A Yes.

Q When you started out, you borrowed $20,000 from a milk company, didn't you?

A Yes.

Q When you wound up, you owed them $17,000, didn't you?

A Yes.

Q And that's because you couldn't pay them;

is that right?

A That's because the store was closed.

Q Could you pay them?

A We were paying them, yes.

Q You owed them $17,000 when you closed, didn't you?

A Yes, but we were paying them.

Q If you had had the $17,000, you would have discharged that debt, wouldn't you?

A Yes.

Q How about Wexler Plumbing, you owed them $1,800, didn't you?

A I'm not aware of that.

Q How was your credit, is that good?

A For the first year's business, yes, people were selling us.

Q For the first year's business? You weren't in business for a year, were you?

A Yes.

Q People were selling you; is that your answer?

A Yes.

Q They were selling you COD, weren't they?

A No.

Q Any firms put you on COD?

A I don't recall.

Q Would you quarrel with a statement that you were on COD by some of your creditors; do you argue with that?

A If you can produce evidence, I wouldn't dispute it.

Q You don't know either way, is that your answer?

A I'm not sure.

Q How about the Standard Milling, did they put you on COD, in June?

A Yes.

Q You're sure of that, aren't you? Aren't you?

A Yes.

Q There were other firms that put you on COD in June or before; isn't that right?

A I have no recollection.

Q Now, did you ever give checks with insufficient funds to Standard Milling?

A As I stated yesterday, if it was done, it wasn't with my knowledge.

Q It was not with your knowledge.

Were you aware at any time of the fact that

Standard Milling had checks of your company that bounced?

A Yes.

Q In fact, you were a defendant in court on those checks, weren't you?

A Yes.

Q There was a warrant for your arrest, wasn't there?

A This I am not aware of.

MR. SHANLEY: Your Honor, I would like, if counsel made that statement to the witness and the witness replied in such a manner, I would ask that the question be stricken.

THE COURT: The question can't be stricken.

MR. SHANLEY: I would ask the jury to disregard it.

THE COURT: The jury will have to determine from the credibility of the witness what to believe in these matters. A question can't be stricken because a witness denies something.

MR. SHANLEY: Counsel doesn't have any evidence to back up that question, your Honor. That's rather a prejudicial statement.

MR. KESTNBAUM: I'm still questioning the

witness, if the Court please.

THE COURT: Is there a basis for the question?

MR. KESTNBAUM: I have a basis for it.

THE COURT: You may question, then.

BY MR. KESTNBAUM:

Q How were you brought into court in that criminal proceeding, Mr. Reicher?

A I went down with my lawyer.

Q Well, were you served with papers?

A I have no recollection of being served with papers.

Q Well, what brought you into court? Don't you know?

A We went in to settle a matter with Standard Milling.

Q You went in to settle a matter in the Criminal Court, didn't you?

A We went into court. I'm not aware if it was Criminal Court.

Q You were a defendant, weren't you?

A Yes.

Q You know it was a criminal case, don't you?

MR. SHANLEY: Your Honor, I would inquire

at this time of counsel, whether or not he has the indictment which he seems to be referring to here? He is referring to a criminal case, and this is rather --

THE COURT: Do you have a basis for this in papers?

MR. KESTNBAUM: I will have a witness.

THE COURT: All right, you may inquire.

BY MR. KESTNBAUM:

Q Now, how many checks were issued by 21-44 Food Corporation to Standard Milling that were returned for insufficient funds?

A I don't remember.

Q You've been in business for some time, haven't you?

A Yes.

Q And you know that under the law of the State of New York it's a crime to issue a check without funds to cover; you know that, don't you?

A Yes.

Q Now, would you look at Defendant's Exhibit A in evidence, and I ask you if that indicates at least two checks issued by your firm without funds to cover?

(Handed to the witness.)

A Yes.

Q And did you sign either or both of those checks?

A I could have.

Q You could have signed them both; is that right?

A Yes.

Q And there might have been others that you did cover that bounced; is that right?

A Yes.

Q And you knew when you issued those checks that you were violating the criminal laws of the State of New York, didn't you?

A No.

Q What's your answer?

A When the check was issued, there was funds in the account.

Q There were funds in the account?

A Yes.

Q Were there funds in the account to cover all the checks that were issued?

A By myself, I had three partners.

Q Well, you were in general charge of the business, weren't you?

A I had three other working partners that had check signing ability. They were allowed to sign checks. I wasn't there constantly signing checks.

Q When you signed checks, were there funds to cover?

A Yes.

Q Were there funds to cover these checks of Standard Milling?

A When I signed those checks, yes.

Q Do you recall that? Do you recall that?

A Yes.

Q Where is your check book?

A Right now?

Q Yes, right now.

A I don't know.

Q Can you find it?

A I don't know.

Q Do you know whether you can find your accounting statements?

A I can call the accountant.

Q Yes, would you do that and bring your check book --

MR. SHANLEY: Your Honor, may I interrupt? Counsel has just as much ability to go out and

get documents, subpoena documents and records, and to ask the witness to do something.

If counsel desired to have these documents, he could have well have obtained them through legal process.

MR. KESTNBAUM: Your Honor, firstly, I don't know who the accountant is, and I think that statement is far from the fact.

And I'm now -- I didn't know what the witness would testify to.

THE COURT: Who is the accountant?

THE WITNESS: Charles Farberman.

THE COURT: Does he have your original books?

THE WITNESS: I'm not sure. I don't think so. Mr. Steinberg took all the papers.

THE COURT: Where is Mr. Steinberg?

THE WITNESS: Excuse me?

THE COURT: Where is Mr. Steinberg?

THE WITNESS: He resides in Flushing.

THE COURT: Is he going to be a witness here?

MR. SHANLEY: His son.

THE COURT: Is he in the building?

MR. SHANLEY: Yes.

THE COURT: All right. During the next recess, call down and have him bring whatever he has, if Steinberg has the documents.

MR. SHANLEY: Your Honor, I don't quite understand this. The witness has testified that he may have signed checks. He doesn't recall. I don't see the relevance of pursuing it.

THE COURT: It's clear what the materiality and relevance is.

You are claiming that this store closed up and gave up its Waldbaum account because of coercion by the defendant. That's what the case is about, and the defendant apparently is claiming, as I understand, that they closed up because they didn't have the funds. So, it is obviously important here.

And, during the next recess, see if you can talk to the witnesses and bring in what they have.

If they don't have it or the books are not in existence, we can't use them.

MR. SHANLEY: May I say the Government obtained a lot of information from the witnesses. They had whatever books and records that they have.

THE COURT: You have the books and records now?

MR. SHANLEY: I have a lot of material.

THE COURT: Well, show it to counsel, whatever you have in the way of records of the company and ask the other partners if they have documents to bring them in if it's convenient to do so.

MR. SHANLEY: Well, I will certainly do that, your Honor. I will state that counsel has had ample opportunity to subpoena records under the rules of criminal procedure, from the Government.

THE COURT: That may be so.

MR. SHANLEY: And to now disrupt and delay this trial because he now wants to look at all this --

THE COURT: He's not going to delay the trial. We're going to go forward expeditiously. I'm interested in seeing that we find the truth in this case and the jury has what it needs to determine it, and whatever the defendant wants, if it is possible to give it to him, we'll give it to him. I'm sure we all want that in the

courtroom, prosecutor and defendant both.

Proceed.

BY MR. KESTNBAUM:

Q Now, I ask you to look again at Defendant's Exhibit A and tell me how much you finally owed Standard Milling?

A $5,102.30.

Q Is it a fact, looking at that exhibit, that you kept owing them more and more as time went on?

A Yes.

MR. KESTNBAUM: May I pass this exhibit among the jury? And there's another exhibit, half the jury had looked at, Exhibit B, they were starting to look at. Half the jury didn't see it.

THE COURT: By all means, you may do it.

(Documents were handed to the jury.)

BY MR. KESTNBAUM:

Q Now, sir, do you know of a bakery known as Denise Pastry at 20-03 Utopia Parkway, don't you?

A Yes.

Q Do you know whose account that was?

A No.

Q Did you ever know that it was the account

of the defendant's company?

A No.

Q Never knew that.

Well, you were out getting accounts of other companies, weren't you?

A Yes.

Q And in fact, you had a nickname in the trade as "Philip the Raider"; isn't that so?

A No.

Q Or a name similar to that?

A No.

Q How about the Clearview Bakery Shop at 163-34 Willets Point Boulevard? Are you aware of the fact that there was a bakery there?

A Yes.

Q And you know that that was a stop serviced by the defendant?

A That stop I knew was Mr. Schwartzberg's.

Q That was right near your Utopia Parkway quarters, was it not?

A Yes.

Q And how about the Clearview Appetizing at 160-08 Willets Point Boulevard, are you aware of that stop?

A Yes.

Q Did you know that the defendant Schwartzberg serviced that stop?

A Yes.

Q And all of those stops were in close proximity to your store?

A Yes.

Q And how about the Waldbaum stop at Francis Lewis Boulevard at 35th Avenue; do you recall that?

A No.

Q Do you know who serviced Denise Bakery?

A No.

Q Did you ever try to find out?

A I approached the account. I spoke with him. I never spoke to the gentleman as to who served him, because we just said hello to each other.

Q "Because we" what?

A We just said hello to each other. We never got into talking business.

Q You tried to get the account, didn't you?

A We just spoke with each other.

Q You tried to get the account, didn't you?

A No.

Q Didn't you just tell the jury you went there to get the account?

A No, I just said to the -- I went there to talk to the man, not about an account: hello, good-by, I walked by.

Q It was a social visit, wasn't it?

A Not, it was not a social visit. I went down the block to buy some merchandise.

Q What caused you to go into that store?

A I didn't go into the store.

Q Didn't you go into Denise's Bakery?

A No, I didn't go into Denise's Bakery. I walked by and said hello to the owner and I kept going.

MR. SHANLEY: Your Honor, objection.

Q By the way, did you ever hear of a man by the name of Philip Saro?

A Yes.

Q Did you do business with him?

A Yes.

Q What was the nature of that business?

A We sold frozen bagels to him. We sold bialys also to him and baked bagels.

Q To him?

A Yes, to his company.

Q To his company?

A Yes.

Q Did he owe you any money?

A Weekly or -- well, he owed me money. But, you know, he paid me.

Q Well, let's take the end of July, 1970, he owed you money?

A Yes.

Q Substantial amount?

A He owed me money. What's "substantial"?

MR. KESTNBAUM: May I have this marked for identification, if the Court please.

THE CLERK: Document marked as Defendant's Exhibit C for identification.

(So marked.)

Q I show you Defendant's Exhibit C for identification --

MR. SHANLEY: May I take a look at that?

MR. KESTNBAUM: I'm sorry, sir.

(Handed to Mr. Shanley.)

Q I ask you if you recognize it?

(Handed to the witness.)

A Yes.

Q What is it?

A A note.

Q A note by whom to whom?

A From Philip Saro to us.

Q May I have it.

MR. KESTNBAUM: I offer it in evidence, if the Court please.

THE CLERK: Defendant's Exhibit C for identification, marked in evidence.

(So marked.)

Q You say that was a note from Philip Saro to you?

A Yes.

Q And you're serious about that, aren't you?

A Yes.

Q You're not trying to fool me or the Court or jury, are you?

A No. Can I see that again?

Q All right, look at it again.

(Handed to the witness.)

Q You want to change your answer?

A This is a note.

Q It's a note, I know. Is it a note from Philip Saro to you?

A No, it's to Philip Saro.

Q Oh, it's from you to Philip Saro; isn't it?

A No, it's to Philip Saro.

Q It's not from you to Philip Saro?

A No.

Q Is your signature on that note?

A Oh, I signed the note, yes.

Q So it is a note from you to Philip Saro?

A Yes, I signed a note giving it to Philip Saro.

Q Now, Philip Saro didn't owe you any money; you owed him money; isn't that right?

A According to the note, yes. But we had business weekly.

Q Well, this note is dated July 22, 1970; is that right?

A Yes.

Q Would you tell the Court and jury how it came about that you owed him money?

A He advanced -- he advanced us money.

Q On July 22?

A Yes.

Q That's after the date you had had this meeting with your partners and decided to go out of business; is that right?

A Excuse me?

Q Sir, you testified yesterday that after you had trouble with your truck, you and your partners had a meeting and decided to give up the Waldbaum account?

A It wasn't immediately after. We were frightened.

Q But you had a meeting, you said, didn't you?

A Yes.

Q That was shortly after this accident with the truck, wasn't it?

A Yes.

Q You had the meeting and it was the general concensus to go out of business, you say?

A Yes.

Q After that, you borrowed $3,000, didn't you?

A The meeting took place two weeks after the truck, after that date.

Q So then you borrowed the $3,000 from an act that was in good faith, wasn't it?

A Yes.

Q And you intended to pay him back?

A Definitely.

Q Did you pay him back?

A Yes.

Q Did you pay the milk company back the 17,000?

A I personally, yes.

Q You paid them back the 17,000?

A Yes.

Q It's liquidated?

A I have a couple of hundred dollars left on it.

Q How about Wexler Plumbing?

A I'm paying him off also.

Q How much do you owe them?

A About a hundred dollars.

Q Do you have any records on that?

A You could subpoena Wexler. I'll verify it.

Q Do you have any records, though?

A I pay him every week a little bit.

Q Do you have records to show that? Do you keep a record of what you pay him?

A Yes.

Q Do you have the records available?

A In the bakery.

Q Now, you had a studio apartment on Woodhaven Boulevard and Fleet Street, didn't you?

A Yes.

Q Who paid for that apartment?

A I did.

Q Personally?

A Through the business.

Q Oh, the business paid for it?

A Yes.

Q The corporation paid for it?

A Yes.

Q In whose name did you take a lease?

A The lease was taken out in Patricia Guze's name. She didn't want the apartment and I took it over.

Q When was that apartment taken?

A I don't recall.

Q And you had 21-44 pay?

A That was after 21-44.

Q Well, when was that apartment obtained?

A A year ago.

Q Is the lease still effective?

A No, I gave the apartment up.

Q But it was in the name of Patricia?

A Yes, she took the apartment. She wanted to move out and then she changed her mind and I took over the apartment.

Q And she came there from time to time?

A To the apartment?

Q Yes.

A Twice.

MR. SHANLEY: Can we have a time frame on this?

THE COURT: I can't hear you.

MR. SHANLEY: Can we have a time frame on this?

THE COURT: Yes, I'm confused now by the time sequence with respect to this apartment.

BY MR. KESTNBAUM:

Q Where is the lease to that apartment?

A I don't have it. It was in her name.

Q She kept the lease when you took it over?

MR. SHANLEY: Your Honor, can we have a time frame?

MR. KESTNBAUM: I'm coming to that.

MR. SHANLEY: The witness testified it was a year ago. That's 1972.

THE COURT: I'll allow counsel to proceed.

Q When did you, do you recall the date of the lease?

A Some time in June of last year.

Q Of '72?

A Yes, that was last year, '72, yes.

Q Are you aware of the fact that Patricia Guze testified in this courtroom --

MR. SHANLEY: Your Honor, the witness has testified that the lease was in June of '72. It's absolutely irrelevant to the trial of this case. This is two years after an alleged crime was committed.

MR. KESTNBAUM: I will connect it very quickly, your Honor.

THE COURT: It may relate to the bias of either one of these witnesses. I think we are entitled to hear it, the jury is.

BY MR. KESTNBAUM:

Q Are you aware of the fact that Patricia Guze testified in this courtroom earlier in the week?

A Yes.

Q Are you aware of the fact that she testified that you took this apartment, that you took the apartment to be near your place of business on Utopia Parkway; are you aware of that?

A No.

Q Do you know who occupied the apartment before June of 1972?

A No.

Q Well, do you know the date that Patricia went there?

A No.

Q Did that apartment have anything whatsoever to do with your firm, your corporation?

A Bagel Stop?

Q Yes.

A I used the apartment to rest in when I took it over.

Q Bagel Stop is on Queens Boulevard; isn't it?

A Yes.

Q And where?

A Sixty-Ninth Road.

Q And the apartment is on Woodhaven Boulevard and Fleet Street, isn't it?

A Fleet Court, yes.

Q Fleet Court. Is that near Fleet Street?

A A block away, I believe.

Q Now, I think you said yesterday that there was extensive damage to the truck after this fire,

wasn't there?

A I didn't say that.

Q Well, was there extensive damage to the truck?

A The tank was damaged because of the material put in to ignite it, and it was impounded.

Q And what was the cost of repairing the truck?

A I don't recall.

Q Was it a thousand dollars?

A No.

Q Two thousand?

A I have no recollection.

Q None at all? You have no recollection?

A I can give you an educated guess, but I have no recollection.

Q Do you remember that you testified before a Grand Jury in this case before the indictment was returned, on July 29, 1970, don't you?

A (No response.)

Q Do you remember that?

A I testified before the Grand Jury, yes.

Q Yes. And I'm telling you that the date was July 29, 1970. And before you testified, you raised

your right hand and swore before God to tell the truth?

A Yes.

Q The whole truth and nothing but the truth, didn't you?

A Yes.

Q I ask you if you recall having been asked these questions and having given these answers:

"Answer: I didn't pick the truck up. I am still using a U-Haul."

MR. KESTNBAUM: Page 14, at the bottom.

"Question: You will be billed for damages to that truck?

"Answer: Yes.

"Question: How much?

"Answer: Seventy-nine dollars and fifty-nine cents. Just the damage to the truck. The other item cost me money to rent the U-Haul."

Do you remember that?

A Yes.

Q Is that the extent of the bill, $79?

A Yes.

Q And that included sales tax, too, didn't it?

A Yes.

Q Now, had you purchased the truck out right or did you owe money on it?

A We owed money on it.

Q How much did you owe?

A I don't recall.

Q You don't have any idea?

A No, we paid notes.

Q It was the only truck you used in the business, wasn't it?

A Yes.

Q All the other deliveries were made by private car?

A Right.

Q That's customary in the industry; isn't it?

A No.

Q To make deliveries by private car?

A It's not customary.

Q It's done, isn't it?

A Yes, it's done.

Q It's done all the time?

A Yes.

Q But it's not customary, is that it?

A Depends on what company you're with. I make deliveries in my personal car. I feel I can get there a

little quicker. I do it. Otherwise I take the truck.

Q How about your partners, did they make deliveries in their personal cars?

A Yes.

Q You know other bagel operators did the same, don't you?

A Yes.

Q You don't think it was customary?

A I own a truck. I will not use my truck to deliver frozen -- my car, to deliver frozen bagels. I couldn't -- I can't get racks in my car. That's what the truck was there for.

Q Otherwise you used private cars?

A Yes, we used private cars on the routes. We couldn't afford to buy three or four trucks.

Q I didn't ask you that. Please don't volunteer information, sir.

Now, you didn't want that truck back because you owed too much money on it, didn't you?

A We didn't want the truck back because we owed too much money?

MR. SHANLEY: The question can't be answered. It's a two-prong question. I think he should rephrase it.

THE COURT: If you think it's misleading, by all means rephrase it, please.

Q You owed a lot of money on that truck?

A We owed money.

Q Do you argue with me when I say you owed a lot of money on it?

A I question it, yes.

Q Do you know?

A Well, I don't know the exact figure of the balance that we owed on the truck. I was only in business six months.

Q How much did you owe originally?

A I believe $2,800.

Q Was it a new truck or a used?

A A brand new truck.

Q The payments were to extend for how many years?

A I believe three years.

Q You had made about four or five payments?

A Four or five payments, yes.

Q Were you up to date on your payments?

A I don't recall that.

Q You were behind, weren't you?

MR. SHANLEY: He didn't recall, your Honor.

A I don't recall that.

MR. KESTNBAUM: I'm taxing his recollection now, if the Court pleases.

THE COURT: You may go ahead.

Q You don't recall?

A No, I don't recall, no.

Q Did you ever rent another truck?

A Yes.

Q July 20th, wasn't it, of 1970?

A Yes.

Q You do recall that day, don't you?

A I recall it for a reason.

Q Yes?

A The truck was blown up on a Friday --

THE COURT: Please.

MR. KESTNBAUM: I move to strike that answer.

Q I'm talking about the new truck. The new truck was blown up?

THE COURT: Excuse me, do you wish to strike the answer or not?

MR. KESTNBAUM: I move to strike the answer to the question, yes.

THE COURT: Motion is granted.

MR. SHANLEY: Your Honor, counsel said to

the witness, "Do you remember that date for a reason, don't you?" And then the witness gave his reason.

MR. KESTNBAUM: I didn't ask him for it.

THE COURT: Please don't quibble, gentlemen. We have conducted this trial in a very dignified manner and let's continue to do so.

BY MR. KESTNBAUM:

Q Now, the new truck you hired, you hired from whom?

A U-Haul It.

Q You used that truck till you went out of business, didn't you?

A Yes.

Q Then you returned it to U-Haul?

A Yes.

Q In the same condition as it was when you first hired it; is that right?

A I believe so.

Q So that truck was not burned or blown up, was it, sir?

A No.

Q Are you trying to mislead the Court and jury here today?

A No.

MR. SHANLEY: Your Honor, the witness testified before that he remembered this date because of the other truck that had blown up.

MR. KESTNBAUM: Your Honor, I object to these summations. Either my question is proper or it isn't. I don't think these speeches before the jury are fair. I think Mr. Shanley has done it from the beginning of the trial to the present time, and I object to it.

THE COURT: You may ask another question.

MR. KESTNBAUM: Thank you, sir.

Q Did you ever have a meeting of your creditors before you closed up?

A No.

Q Well, now, let's see. When you closed up, you owed Standard Milling over $5,000, didn't you?

A Yes.

Q And you owed your milk company over 17,000, didn't you?

A Yes.

Q You owed Wexler Plumbing over 1,800, didn't you?

A It was 1,300.

Q 1,800?

A 1,300.

Q Oh, 1,300. And you had other debts, didn't you?

A Yes.

Q That may have amounted to say, twenty thousand dollars; is that a fair estimate?

MR. SHANLEY: Perhaps counsel could specify.

MR. KESTNBAUM: Your Honor, I object to the statement of counsel.

THE COURT: Well --

MR. KESTNBAUM: Either question is fair or it isn't.

THE COURT: I think we have now a question before the witness.

MR. KESTNBAUM: Yes, your Honor.

THE COURT: If you can answer it, please do so. You may reflect on it if you'd like.

A No.

Q Well, what's your best estimate?

A About nine thousand.

Q Nine thousand.

MR. KESTNBAUM: Your Honor, in the meantime, I don't believe the jury has seen Defendant's

Exhibit C in evidence. May I pass that around?

THE COURT: You may circulate it.

Q Does that include the money owed to Philip Saro?

A No.

Q Well, that would make it twelve thousand, wouldn't it?

A No, because we sold more merchandise to him. We were doing business right along with Mr. Saro.

Q How much business were you doing with him a week?

A Seven hundred.

Q Seven hundred. So assuming that he didn't pay you for the following week, that would reduce the indebtedness by about $700, would it?

A Yes.

Q So that would add about $2,300 to your estimate of nine, wouldn't it?

A Yes.

Q Now, is it or isn't it a fact that 21-44 Food Corporation built up its business basically by taking accounts from others?

A Yes.

Q And in order to do that, you had to cut

prices to the bottom, didn't you?

A Occasionally.

Q You had to undercut the firm that was currently serving the account, didn't you, to get the business?

A Well, sometimes the firms didn't want to do business any more because the product was inferior.

Q And sometimes you had to undercut to get it?

A Yes, sometimes we did undercut.

Q When you undercut, you lost money on the account, didn't you?

A Well, that's relative.

Q It's relative.

But you lost money, didn't you?

A No, I wouldn't say that.

Q You didn't make any money on them?

A Then I wouldn't sell the account. There was no point in it.

Q Didn't you work out deals to sell for a certain amount for a certain period and then increase your price?

A Yes.

Q So that for the initial period you were

prepared to lose money, weren't you?

A No. There is a profit margin and you can stretch it a little bit or squeeze it a little bit.

Q I think you testified yesterday you made your own bialys for a while?

A Yes.

Q When was that?

A Beginning of July.

Q Beginning of July?

A Yes, late June.

Q For how long did that continue?

A For one week.

Q From about July 1st to July 8th?

A Yes, late June, early July.

Q Now, when you testified before the Grand Jury on July 29th, you were still in business, weren't you?

A We went out of business July 28th.

Q So you were out of business. Do you remember having been asked this question and having given this answer:

"Question: What kind of business is he in?

"Answer: The bagel and bialy business."

MR. SHANLEY: What page, please?

MR. KESTNBAUM: Page 8.

"Question: Does he make bagels?

"Answer: Yes.

"Question: Does he also make bialys?

"Answer: Yes."

And that is referring to the defendant, Benjamin Schwartzberg.

"Question: You don't make bialys?

"Answer: No, I buy them."

Do you remember them? That's after you were out of business, you made that answer.

A Yes, but the --

Q Weren't you telling the Grand Jury that you had not made bialys; that you bought them?

A Yes. I bought them. But there came a time when I wasn't allowed to buy them. Nobody would sell me. So I was forced to make them.

Q You went to various bialy people and tried to buy bialys, didn't you?

A Yes.

Q Nobody would sell you?

A We were buying bialys, we were buying from Mr. Schwartzberg, and then we stopped buying them and we started buying from S & S.

Q I think you said yesterday the reason you stopped buying from Mr. Schwartzberg was because the bialys came in different sizes and shapes?

A No, they were mixed.

Q They were mixed?

A Old bialys were mixed in with fresh bialys, yes.

Q Didn't you talk about some being smaller or different shape?

A No.

Q Didn't say that yesterday?

A No.

Q As a matter of fact, the reason you stopped buying bialys from Mr. Schwarzberg was because you had then taken over the Waldbaum account; isn't that why?

A No.

Q It had nothing to do with it?

A It had nothing to do with it.

MR. KESTNBAUM: Page 10, Grand Jury minutes.

Q Do you remember having been asked this question on July 29, 1970, and having giving these answers:

"Question: Were you supplying these stores with your bagels and bialys?

"Answer: Benny Schwartzberg's bialys. Right after I took five Waldbaums from Benny, we

severed our relationship and I started doing business with his nephew, Marty, and I started taking bialys from my wholesale, right from Marty, for my Waldbaums and every store I told you."

Do you remember that question and answer?

A Yes.

Q Would you like to correct your previous answer, sir?

A Yes.

Q So the reason you stopped taking the defendant's bialys is because you severed your relationships when you took five accounts of his from Waldbaums; is that right?

MR. SHANLEY: Your Honor, that's a double question, once again. A severing of a relationship, that has a phraseology --

THE COURT: I'll allow it, if you find you can answer. If you have any difficulty, I'll have counsel rephrase it.

THE WITNESS: Could you have him rephrase it?

THE COURT: Yes.

BY MR. KESTNBAUM:

Q You took five stops from the defendant, Benjamin Schwartzberg; is that right?

A Yes.

Q Then you severed your relationship with him?

A Yes.

Q You stopped buying his bialys following the time that you took five stops from him?

A Yes.

Q That's the reason you stopped buying his bialys?

A That was one of the reasons.

Q That's the reason you gave the Grand Jury, isn't it?

A Well, I didn't go into detail.

Q You answered the question that was put to you, didn't you?

A Yes.

MR. SHANLEY: Your Honor, counsel is argumentative and he's misreading the Grand Jury testimony.

MR. KESTNBAUM: Your Honor, I object to these statements by the prosecutor, particularly in the presence of the jury. I've been accused of delaying the trial, of doing a lot of things which aren't true, and I think the prosecutor desperately wants a mistrial here. I object to

these statements. If he wants a side-bar conference, I wouldn't oppose it, your Honor.

THE COURT: I don't think either counsel has acted improperly, and I don't believe that there's any indication that you've delayed the trial or you're asking improper questions or that the counsel for the Government is desperately seeking a mistrial or seeking a mistrial at all.

I don't understand why we have to have this colloquy, and I would appreciate counsel for the Government sitting down again and counsel for the defendant asking another question.

MR. KESTNBAUM: Thank you, your Honor.

BY MR. KESTNBAUM:

Q Now, you testified yesterday that the five accounts that you took from the defendant, the Waldbaum accounts, amounted to $50,000 annually; is that right?

A Twenty-five thousand dollars.

Q Didn't you say fifty thousand?

A Five hundred dollars a week.

Q By the way, this Bagel Stop on Queens Boulevard was owned by whom?

A Myself and my brother-in-law.

Q So that was a different entity than 21-44 Food Corporation?

A Yes.

Q Different corporation with different owners?

A Well, we owned Bagel Stop, Inc., and we owned part of 21-44.

Q Yes, but there were others in 21-44 who had nothing to do with Bagel Stop?

A Yes.

Q Did Bagel Stop owe 21-44 any money?

A Yes.

Q How much?

A At what period?

Q Well, let's take July of 1970, how much did it owe?

A $1,700.

Q And at the time that 21-44 closed, how much did it owe?

A 1,700 -- $1,500.

Q It always owed 21-44 --

A Money.

Q -- didn't it?

A Not always, no.

Q Well, for a period of several months, it did, didn't it?

A In the course of business, yes. This is a normal --

Q For several months?

A This was a normal course of business, yes.

Q For one single store to owe $1,700, that's normal?

A Do you think that's a lot of money?

THE COURT: Please, just answer the questions. The questions will be posed by the counsel.

A Could you come back with the question again?

Q Don't you think that $1,700 is a lot of money for a single retail bagel store to --

A No.

Q Thank you.

Well, that hurt the financial condition of 21-44, didn't it?

A Yes.

Q In fact, it was in June of 1970 that your check for $62.60 for the defendant, by 21-44 Food Corporation, bounced; is that right?

A Yes.

Q And if you would have had that $1,700,

that $62 check wouldn't have bounced, would it?

A That's speculative. Yes.

Q Is that speculative, if you had $1,700 in your account?

A No, no.

Q Well, the fact of the matter is that in June of 1970, 21-44 Food Corporation was in desperate condition, wasn't it?

A No.

Q It couldn't even meet a check of $62; is that right?

A Yes.

Q And it owed creditors maybe thirty odd thousand dollars, didn't it, as we have gone over before?

A Yes.

Q And you even had to go out to your accounts that you were selling to and borrow money from them, didn't you?

MR. SHANLEY: Perhaps counsel could specify a little more.

THE COURT: No, I think it's an appropriate question. The witness is reflecting.

A We took an advance on an account, yes.

Q I didn't hear you?

A Yes, we took an advance on an account.

Q You took an advance on an account. From how many accounts?

A Philip Saro.

Q Any others?

A That was it.

Q No?

A No.

Q And Philip Saro, of course, trusted you, didn't he?

A Yes.

Q To show his deep and abiding trust in you, he took a note which you all signed personally, which is Defendant's Exhibit C in evidence; is that right?

A Yes.

Q Do you know a Mr. Treitler?

A Excuse me?

Q Do you know a Mr. Treitler?

A No.

Q What's the name of your father-in-law?

A Mr. Teitler.

Q Teitler, I beg your pardon.

In June of 1970, did you go to your

father-in-law and ask him for a $20,000 loan?

A No.

Q Did you ever ask him for any money in 1970?

A Personally or for the business?

Q For your firm.

A Yes.

Q And didn't he tell you in June of 1970 that he wouldn't put his hard earned money into a sick business?

A No.

Q He refused the loan, didn't he?

A It wasn't a loan.

MR. SHANLEY: The witness testified that he did not approach him for a loan at that time.

MR. KESTNBAUM: He said not personally.

Q The business, you asked him on behalf of the business, didn't you?

A No.

Q Personally?

A No.

Q Did you ever ask him for money?

A Yes.

Q For whom?

A He had money. He -- when we opened the business, he had pledged money. This was his share of the money going into the business.

Q So when had you asked him for money?

A He was supposed to put the money in as soon as he received it from another business that he had sold.

Q Did he ever put his money in?

A He never received it. The business closed before then.

Q Let me come back for a moment to the matter of bialys. You said other bakeries wouldn't sell you bialys?

A Yes.

Q Isn't it a fact that with respect to these other bakeries that wouldn't sell you bialys, you were taking their accounts from them, weren't you?

A No.

Q From any of them?

A No.

Q They just simply refused to sell you bialys; is that right?

A Yes.

Q Didn't one of them tell you "I wouldn't do business with you, you're known as "Philip the Raider""?

A I've never heard the term before, and nobody ever told me that.

Q In June of 1970, did you know an Eddie Horowitz?

A Eddie Horowitz?

Q Yes.

A No.

Q Did you ever hear of Galaxy Bagel Company?

A Yes.

Q Do you know a man with Galaxy Bagel known as Eddie Horowitz?

A His name is Eddie Heimowitz (phonetic).

Q Heimowitz?

A Yes.

Q Did you tell him, in June of 1970, that your firm is broke and you're sorry you ever went into the business and you were getting out?

A No.

Q Did you ever tell him anything in substance to that effect?

A No.

Q Well, now, I see you paused. Are you sure you never told him that?

A Well, I had a conversation with him.

Q About how tough things were?

A No, about selling him frozen bagels for him to bake off.

Q For him to what?

A For him to bake off.

Q Didn't you complain about how bad business was?

A I don't believe so.

Q Now, have you told us fully and fairly of the debts your firm had at about the middle of July of 1970?

A Are you including the machinery?

Q Well, how much did you owe on the machinery?

A About one thousand dollars. A 100,000

Q So I think we had agreed on a figure of about thirty-three thousand before.

A Thirty-thousand.

Q That makes it one thousand more than thirty thousand. A Hundred and thirty thousand

Were you behind on your payments on the machinery?

A Yes.

Q Quite a bit, weren't you?

A No.

Q How many months?

A One.

Q Now, we're talking about what month now, sir?

A We're talking about the slow months of June, July.

Q I didn't ask you whether June is a slow month or a fast month. Some people think they go by pretty fast.

You were behind in July, you were behind what payments?

A You want to clarify that?

Q The middle of July, how many payments did you owe on your machine?

A Oh, one.

Q Was that the month of June?

A Yes.

Q And the month of July, you didn't meet, did you?

A We closed up.

Q Will you answer my question: Did you pay the July --

A No.

Q So you owed two months at the time you closed up, didn't you?

A One month.

Q You owed June -- what date was the July payment due?

A I don't recall the payment dates.

Q Do you dispute the fact that you didn't pay July?

A I'm not disputing the July payment.

Q So you owed it, didn't you?

A Yes.

Q Do you dispute the fact that you owed two months on your machinery?

A I state one month and you're trying to say two months.

MR. SHANLEY: Your Honor, this is argumentative. I said that, your Honor -- excuse me, the line of questioning was rather argumentative.

THE COURT: Yes, we'll proceed with the next question. Go ahead.

Q Now, I think you said yesterday that you had about fifteen employees?

A Yes.

Q Could you briefly describe what work they did? By that I mean, did you have a messenger boy, a few bakers? What did they do?

A I had a routeman that took the route out at night.

Q Yes.

A I had a production man that manufactured the bagels. I had two people to take the bagels off the machines and put them on the board and put them in the racks. I had some people to sell retail. I had some check-out girls.

Q Did you have a boy working there, too?

A Excuse me?

Q A boy, a general purpose boy working there?

A Well, everybody was general purpose. Certain people were delegated. The production people in the back had their jobs, but the front was --

Q All right.

The beginning of July, 1970, were you up to date in your salaries to your employees?

A In July of 1970?

Q Beginning of July, yes or no, were you up to date?

A No.

Q How many weeks did you owe?

A I don't recall.

Q You don't recall how many weeks salary you were behind with your employees?

MR. SHANLEY: Objection; argumentative.

THE COURT: I'll allow further inquiry on this.

Q You don't recall?

A No, sir.

Q Was it two or three or four weeks?

A I don't recall.

Q You owed all of your employees money, the beginning of July, for salary?

A Yes.

Q And you were in pretty good shape then; is that right?

A We were building a business, yes.

Q Sure, you were building a business.

Were you brought into the Criminal Court in early July because you owed salaries?

A No.

Q You owed all fifteen of your employees back salary beginning of July, 1970; is that right?

A Yes.

Q And you owed them back salaries to the day you closed the end of the month; is that right?

A Some.

Q And you owed them salaries long before

July 17, 1970; is that right?

A No.

Q Well, when did you start to fall into arrears?

A Well, you've established July. Early July.

Q That's when you fell weeks into arrears; is that right?

A That's what you have established.

MR. KESTNBAUM: Thank you very much. That's all.

MR. SHANLEY: May I have one minute, your Honor?

THE COURT: Do you want to take a break for a few minutes?

MR. SHANLEY: Yes.

THE COURT: All right, we'll take a five-minute recess, ladies and gentlemen.

(The jury left the courtroom.)

THE CLERK: Court's charge is marked as Court's Exhibit 2.

(So marked.)

THE CLERK: Additional page to charge is marked Court's Exhibit 2A.

(So marked.)

(Whereupon, at this time a short recess was taken.)

AFTER RECESS

(The trial was continued. The jury is not present.)

MR. KESTNBAUM: Your Honor, I have one or two more questions I overlooked.

THE COURT: All right.

Have your next witness stand by.

(The jury entered the courtroom, the Government's witness, Philip Reicher, resumed the witness stand.)

CROSS-EXAMINATION

BY MR. KESTNBAUM: (Cont'd)

Q Now, sir, in July of 1970, did you ever tell anyone that if we can get Benny Schwartzberg, we can grab all his business? Did you ever tell anyone that?

A No.

Q Did you ever use words to that effect or substance?

A No.

Q Were you unionized?

A Yes.

Q All your employees were union?

A No, only one was unionized, Darryl and myself.

Q Fifteen employees were not?

A Fifteen employees, didn't all work in the bagel department, the production of the bagels.

Q None of them were unionized?

A That worked in the bagel department?

Q Yes.

A Darryl and myself, that was it. We worked in the bagel department. Some of them weren't unionized, no.

Q All the other fifteen -- the fifteen employees were nonunion?

A Yes -- well, Darryl was one of the employees.

Q They weren't working in the men's clothing department, were they?

A No, they were working in the dairy department and the check-out, and so on.

Q And in the bagel store, they were selling bagels?

A Yes.

Q All of your major competitors were union, weren't they?

A Yes.

Q By "union," I mean the employees were union.

A The bagel production men, producers.

MR. KESTNBAUM: That's all.

REDIRECT EXAMINATION

BY MR. SHANLEY:

Q The bagel production men were union; is that right, Mr. Reicher?

A Yes.

Q Those were the people who actually made the bagels?

A They manufactured and baked them.

Q That's your understanding of the way your competitors operated?

MR. KESTNBAUM: I object to leading by counsel in redirect.

THE COURT: I'll allow some of it.

Proceed.

Q Now, Mr. Reicher, you testified on cross-examination that you were building a business. You were -- "We started to build," I think that's the quote you used?

A Yes.

Q Now, when you start to build a business and you're building, what do you do?

A We go out after accounts. We solicit accounts.

Q After this series of incidents, did you

solicit accounts?

A No.

Q Why not?

MR. KESTNBAUM: I object to why he didn't, if the Court please.

MR. SHANLEY: Your Honor, counsel --

THE COURT: No, I don't see how we can avoid the problem here.

MR. KESTNBAUM: We had that yesterday on direct. It's a rehash again.

MR. SHANLEY: Counsel asked him a question on cross-examination.

THE COURT: I'll allow it. Go ahead.

MR. KESTNBAUM: Except.

A I was afraid to go out and solicit accounts. I didn't want to take Mr. Schwartzberg's accounts any more.

Q Mr. Reicher, you testified on cross-examination, you testified that you know Ben Schwartzberg had the Clearview Bakery and Clearview Appetizer; is that correct?

A Yes.

Q Did you attempt to solicit those accounts?

A I wouldn't go near them.

MR. KESTNBAUM: Objection, your Honor.

THE COURT: I want to know what the date is.

MR. SHANLEY: In the period we're talking, in the summer of 1970.

THE COURT: You mean July?

MR. SHANLEY: July of 1970.

THE COURT: I'll allow it.

A Yes?

Q Did you attempt to get those accounts?

A No.

Q Why not?

A I was afraid.

Q Afraid of what?

MR. KESTNBAUM: Objected to, if the Court pleases.

THE COURT: I don't see how we can avoid it. You asked about it on cross.

Proceed.

A I was afraid. The truck was blown up. The windows are broken. I could have been next. So I just -- I laid off.

Q You testified also on cross-examination that you, in response to a series of questions, that you went into court with regard to a bill with Standard Milling; is that correct?

A Yes.

Q What was the ultimate result?

A I paid them. I was cleared.

Q Mr. Reicher, did you ever sign a check that you knew would bounce?

A No.

Q You testified on cross-examination, Mr. Reicher, that after your recollection was refreshed, that the damage to the truck bill was seventy odd dollars. Where was the truck?

A The truck was impounded.

Q Could you get the truck back?

A No.

Q Who had the truck?

A The police department, they needed it for evidence.

Q Now, there was some testimony on cross-examination, also, Mr. Reicher, Defendant's Exhibit --

MR. SHANLEY: Could I see the exhibit?

MR. KESTNBAUM: Sure.

(Handed to Mr. Shanley.)

Q And you looked at this Star of David Bagel Corporation with this insufficient funds check of yours for 62.60; is that right?

A Yes.

Q That was a check that didn't clear through the account of 21-44?

A Yes.

Q This was in June of 1970, June 24th of 1970; is that right?

A Yes.

MR. SHANLEY: Mark this for identification, please.

THE CLERK: Document marked as Government's Exhibit 47 for identification.

(So marked.)

THE COURT: Show it to counsel. He may not have any objection.

MR. SHANLEY: Yes, your Honor.

(Handed to Mr. Kestnbaum.)

THE COURT: Any objection?

MR. KESTNBAUM: No objection.

THE COURT: Mark it in evidence.

THE CLERK: Government's Exhibit 47 for identification is marked in evidence.

(So marked.)

MR. SHANLEY: Thank you.

I ask --

Q I show you this Government's Exhibit 47 in evidence. Do you recognize that check?

(Handed to the witness.)

A Yes.

Q What's the date on that?

A July 10th.

Q And who is it made out to?

A Queens Bialy Corporation.

Q How much is it for?

A 68.10.

Q Is there any indication on that check that that check bounced?

MR. KESTNBAUM: Objected to. The check speaks for itself, if the Court please.

Q Did it clear through the account?

A Yes.

MR. SHANLEY: May I show this to the jury?

Q That's the check that you gave to Mr. Schwartzberg on July 10th when he had the conversation with you; is that correct?

A Yes.

Q So, Mr. Reicher, Mr. Schwartzberg, despite the fact that a check bounced a month or so previously, continued to do business with you up until on or about

July 10th; is that correct?

MR. KESTNBAUM: Your Honor, that's objected to. It calls for a conclusion. A check in evidence merely indicates a payment, sir.

THE COURT: Well, I know. But the question is appropriate.

MR. KESTNBAUM: All right.

A Yes.

Q And it was on or about July 10th or so that you severed your relationship that you said?

A Yes.

MR. SHANLEY: Thank you, Mr. Reicher.

You may inquire.

Your Honor, I have one more question, if I may.

THE COURT: Would you get your next witness ready.

MR. SHANLEY: Your Honor, I have one more question.

BY MR. SHANLEY:

Q Mr. Reicher, with regard to the machinery in the store, what you testified to on cross-examination, the ovens and all that equipment, who was the man who you dealt with with regard to those?

A Mr. Bill VonWagner.

Q Subsequent to your closing, did Mr. Bill VonWagner come to your house?

A Yes.

Q And did you have a conversation with him?

A Yes.

Q What did he tell you?

MR. KESTNBAUM: Objected to; subsequent to July of 1970.

MR. SHANLEY: Your Honor, this has a bearing on the credibility of the witness and on the whole point that Mr. Kestnbaum is trying to --

THE COURT: No, I'm not going to allow this hearsay to come in. It has no bearing on the state of mind dealing with the critical question here.

MR. SHANLEY: Your Honor, this has been testimony elicited that there was a substantial debt involved with it, with this machinery. This testimony is going to clarify that point.

THE COURT: Well, then you'll have to bring in that witness. I'm not going to allow this witness to testify as to what that witness told him.

MR. SHANLEY: Can this witness testify as to what he said?

THE COURT: Certainly not.

MR. SHANLEY: Counsel has referred to, upon occasion, hearsay statements made by people other than in the presence of the defendant to establish certain events which took place, your Honor.

THE COURT: The hearsay rule, as you know, is very complex. When you objected or counsel for the defendant has objected, I've ruled. Counsel has objected and I've ruled.

Ask your next question, if you have one.

MR. SHANLEY: I have no further questions.

THE COURT: Thank you, sir.

MR. KESTNBAUM: Just a moment.

May I have your last exhibit, that check -- oh, the jury has it?

THE COURT: It's before the jury. Proceed.

MR. SHANLEY: The jury has it.

THE CLERK: The jury has it.

RECROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Now, you say that you didn't solicit certain accounts that were serviced by the defendant because you

were afraid to?

A Yes.

Q You know that the defendant serviced those accounts in early 1970, don't you?

A Yes.

Q And you weren't afraid to solicit them then, were you?

A I never solicited the two accounts in question.

Q You just didn't bother; isn't that right?

A No, I was afraid.

Q You were afraid to solicit them in January of 1970?

A I wasn't soliciting at that time.

Q You were afraid to solicit them in February of 1070?

A I wasn't soliciting at that time either.

Q Didn't you testify earlier in your direct examination that when you started business you had to build by soliciting accounts?

A Yes.

Q Didn't you solicit accounts in January?

A Not myself.

Q In February, wasn't there soliciation by your firm?

A Yes.

Q And in January, wasn't there solicitation by your firm?

A Yes.

Q And in March?

A Yes.

Q And in every month?

A Yes.

Q In fact, you personally solicited the Waldbaum accounts that the defendant lost?

A Yes.

Q When did you do that?

A I solicted them.

Q I asked you when you did that?

A In June, late June.

Q Do you know whether your partners ever solicited the other accounts you have just referred to?

A They never did.

Q Do you know why they didn't, in January?

A No.

Q Do you know why they didn't do it in February?

A No.

Q Well, they weren't afraid to, were they?

MR. SHANLEY: Objection, your Honor.

THE COURT: I'll allow it.

Q Is that right?

A I don't know.

Q Do you know whether they were afraid to solicit them in March of 1970?

A No.

Q Do you know whether there were afraid to solicit them in April of 1970?

A No.

Q How about May and June, is your answer the same?

A No, then I was soliciting.

Q But you didn't go to these accounts?

A No.

Q You went to the big accounts, Waldbaum's, didn't you?

A Yes.

Q These were too small for you to bother with at the time, weren't they?

A No.

Q You didn't get around to them?

A You can say that.

Q Well, then, your answer is you didn't get

around to them, not that you were afraid; isn't that the truth?

A I wasn't soliciting at that time, The times you had mentioned to me, other people were soliciting. I wasn't on the outside then.

Q But you said you didn't get around to them?

A I didn't get around to them in June when I went out looking for accounts.

Q That's why you didn't solicit them, you were too busy?

A When I did get time, I was too frightened.

Q You had time in July, wasn't there?

A Yes.

Q Until July, you didn't have time to go out?

A Excuse me?

Q Until July, you didn't have time to go out, did you?

A I wasn't the solicitor at that time. I started soliciting late June and early July.

Q Didn't you solicit in May?

A My company did, yes, but I wasn't the person.

Q Didn't you solicit in May?

A No.

Q As far as you know, no representative of

your company ever solicited those accounts in May or June or at any time previously; is that right?

A Yes.

Q And you don't know why?

A No.

Q Now, in the course of your solicitation and your company's solicitation, you took accounts from others as well as the defendant, didn't you?

A Yes.

Q You took Waldbaum's accounts from others?

A Yes.

Q And you took many other accounts from others?

A Yes.

Q And you were building your business by taking accounts from others, weren't you?

A Yes.

Q And in many instances undercutting them on price?

A No.

Q You did business with the defendant in July of 1970, you say?

A Up until about July 1st, 2nd, 3rd.

Q Now, you have produced a check, the

Government's Exhibit 47 in evidence, made to Queens Bialy Corporation, in the sum of $68.10.

Was that in payment of the no good check?

A I don't know.

Q Could you tell of any business that you did with the defendant in July of 1970?

A (No response.)

Q Sir, let me help you if I can.

A I'm trying to get the date straight.

Q When did you get the Waldbaum account?

A We started the Waldbaum account 5th, 6th, or 7th of July, the first week in July, after July 4th.

Q Were you doing business with the defendant after that?

A No.

Q So when you got those accounts right after July 4th, that was the end of your business relationship with him; right?

A Yes.

Q And this no good check which you have said was dated June 24, 1970, look at the Defendant's Exhibit B, that's the date of the bank notice of its return for insufficient funds; is that right?

A Yes.

Q Actually, your check was dated some time before that, wasn't it?

A Yes.

Q And in order to collect on this no good check, the defendant had to call at your place of business, didn't he?

A I presume so.

Q That was July 10th; right?

A I don't know -- I don't think so.

MR. SHANLEY: Are the checks the same amount?

THE WITNESS: There are two different figures.

MR. KESTNBAUM: I'm not asking about that, your Honor. I'm merely asking whether he called on July 10th.

Q Is that right?

A He came to the bakery on July 10th, yes.

Q That was to get his money, wasn't it?

A To collect the bill, yes.

Q For the no good check?

A I don't know. One check is for $68. There are two different figures.

Q Did you order that check drawn, Government's Exhibit 47?

A Yes.

Q But you didn't sign it, did you?

A No.

Q Now, did something happen to your bank account, to the firm bank account, sir, between June 24th, 1970, and July 10th, 1970?

A Do you want to rephrase that?

Q I'll rephrase it for you.

Look at the bank notice of July -- of June 24th, 1970. What was your bank at that time?

A Chase-Manhattan.

Q What branch?

A 115.

Q The first three numerals of that account indicate the branch number; is that right?

A Yes.

Q Would you give us the number of that account?

A There's no first three numbers here.

Q But it was branch number 115?

A I don't see it here.

Q Well, you've said it's 115, you supplied that information --

A Oh, yes.

Q -- is that right? Now, look at Government's

Exhibit 47. What's the branch number on that account?

A 117. This is the Forest Hill branch.

Q Now, you'll note that there is a five dollar difference between Defendant's Exhibit B, which shows a check in the sum of $62.60, and Government's Exhibit 47, which shows a check in the sum of $68.10, you've noticed there's a five dollar difference?

Well, isn't that accounted for by the fact that from the time of the issuance of your first check, which was returned on June 24th, 1970, you owed the defendant another five dollars?

A For merchandise bought?

Q Yes.

A No.

Q Couldn't be?

A Five dollars?

Q Five dollars.

A No.

Q Well, how do you account for the difference?

A Two different checks.

THE COURT: I don't want to get involved in this at this late stage. Go to another line, please.

Q Now, when the defendant called at your

place of business on July 10th, isn't it a fact that you didn't want to pay him what you owed him?

A No.

Q Isn't it a fact that you had words about the money that you owed him?

A No.

Q And that he had to call for it at your place of business?

A No.

Q Had you tried to mail him the money you owed him in the meantime?

A No.

MR. KESTNBAUM: That's all.

THE COURT: Step down, sir.

2:15, ladies and gentlemen. Don't discuss the case. Have your witnesses here.

(The jury left the courtroom.)

THE COURT: Now, how many other witnesses are we going to have? I have another case I'd like to start this afternoon.

MR. SHANLEY: Your Honor, I have four more witnesses.

THE COURT: What are they going to testify to?

MR. SHANLEY: Well, one witness is going to testify, Mr. Morris Pitt, is going to testify as to the Waldbaum accounts, conversations with Mr. Schwartzberg.

THE COURT: All right.

MR. SHANLEY: Then I have got Mr. Darryl Steinberg. I have an employee of the 21-44 Corporation.

THE COURT: What is that person going to say?

MR. SHANLEY: He's got some very pertinent evidence, your Honor, as to conversations with the defendant during this time frame.

THE COURT: That I'll permit.

What else?

MR. SHANLEY: I have another witness who will testify as to prior similar acts.

THE COURT: Prior similar acts?

MR. SHANLEY: Yes, your Honor.

MR. KESTNBAUM: Your Honor, I think you have allowed reputation in, but we're not going to have a dozen trials here.

MR. SHANLEY: It's the same, prior similar acts.

THE COURT: Prior similar acts don't come

in. You mean, they were brought to the attention of this company?

MR. SHANLEY: Prior similar acts of the defendant to show his intent to do this. Pattern of conduct, Second Circuit, your Honor, many cases that say prior similar acts and it is admissible to show intent.

THE COURT: What are the prior similar acts?

MR. SHANLEY: Would be a threat.

THE COURT: To who?

MR. SHANLEY: To a bagel manufacturer.

THE COURT: When?

MR. SHANLEY: In 1964.

THE COURT: No, too remote. What else?

MR. SHANLEY: The fire marshal, your Honor. He's going to testify as to the fire, the incendiary origin of the fire.

THE COURT: In this case?

MR. SHANLEY: In this case.

THE COURT: That I'll permit. What else?

MR. SHANLEY: That's it, your Honor.

THE COURT: The prior similar act will not come in.

MR. KESTNBAUM: Your Honor, I do think I may have some witnesses.

THE COURT: I may have to start this other trial this afternoon and draw a jury, but we'll do what we can with it.

MR. SHANLEY: Thank you, your Honor.

(Whereupon, a luncheon recess was taken until 2:15 p.m.)

AFTERNOON SESSION

(The trial was continued. The jury is not present.)

MR. SHANLEY: Your Honor, may we approach the bench for a moment?

THE COURT: Yes.

MR. SHANLEY: Mr. Kestnbaum?

THE COURT: Yes.

MR. SHANLEY: You recall that conversation we had before, Mr. Kestnbaum. I was prepared, your Honor, to introduce into evidence certified copies of the court record in Queens Criminal Court with regard to the arrest of Mr. Schwartzberg in 1971, 1970, solely for the purpose of showing

that he didn't spend any time incarcerated. He was released on bail the following morning, the 17th.

THE COURT: What difference does that make?

MR. SHANLEY: And also the case was dismissed and notation being that Federal indictment had been filed.

THE COURT: What difference does that make?

MR. SHANLEY: There may be some question in the jurors' mind as to what happened, whether the defendant remained incarcerated as to -- or whether he was ever --

THE COURT: You want this introduced?

MR. KESTNBAUM: No.

THE COURT: All right, we won't have it. Mark it as an exhibit for identification. I don't want to confuse the jury any more.

MR. SHANLEY: No, your Honor. All I would ask is that counsel stipulate that he will not, in his summation, make any reference to whether or not there was a -- the defendant had been tried in this matter and whether or not

he spent any time in jail.

THE COURT: Obviously he can't.

MR. KESTNBAUM: I can't. And, as Mr. Shanley well knows, I never bring anything irrelevant into my arguments.

MR. SHANLEY: There may be some question in the jurors' mind, well, he was arrested, what happened?

MR. KESTNBAUM: I will not inject that matter at all into the trial or summation.

THE CLERK: That's Government's Exhibit 48 for identification.

(So marked.)

THE COURT: Bring in the jury, please.

(The jury entered the courtroom.)

THE COURT: Do you have your witness ready?

MR. SHANLEY: Yes, your Honor.

THE COURT: Let's have him in here.

MR. SHANLEY: Government calls as its next witness Mr. Morris Pitt.

THE COURT: Where is he?

MR. SHANLEY: He's coming in from the witness room, your Honor.

M O R R I S P I T T, called as a witness in behalf of the Government, being first duly sworn by the Clerk of the court, testified as follows:

THE CLERK: Will you state your full name, please.

THE WITNESS: My name is Morris Pitt.

THE CLERK: Spell your last name.

THE WITNESS: P-i-t-t.

THE CLERK: Please have a seat.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Pitt, you are here pursuant to a subpoena served on you; is that correct?

A Right.

Q By whom are you employed?

A Waldbaum's -- Waldbaum's Supermarkets.

Q And for how long?

A Nineteen years.

Q Where are they located, your office?

A 700 East Gate Boulevard South, Garden City, New York.

Q Now, what is your title?

A I'm vice president in charge of prepared foods.

Q And is there a geographic area in which you have jurisdiction, so to speak?

A Well, we trade in the metropolitan area and Westchester County.

Q And in the Nassau County?

A Right.

Q And Queens?

A Right.

Q And could you tell the Court and jury basically what your duties are?

A I'm in charge of the deli and appetizing options for the company.

Q What does that emcompass doing, what do you do?

A I do all the purchasing and all merchandising and all the buying.

Q And when you say the buying, do these supplies include bagels and bialys?

A They do.

Q Now, how many stores do you buy for, approximately?

A Eighty some odd stores -- eighty-three stores.

Q And are you familiar with all of them?

A I am.

Q You've been to every store, as best you can recall?

A Yes.

Q Would you describe, with regard to your -- these stores are supermarkets; is that correct?

A Yes.

Q Waldbaum Supermarkets?

A Yes.

Q In particular, bagels and bialys, are they purchased on a daily basis?

A They are.

Q And how many times a week?

A Six times a week.

Q And are you familiar with the procedures used by your supermarkets with reference to the delivery of the bagels and bialys, what happens when they arrive?

A Yes, I am.

Q Will you tell us?

A As a rule, the drop them in the morning before the store opens. And there's a bill left as to the amount of it, as to the amount left. And this bill is filed by the manager.

Q And what, and writes it filed?

A Well, at the end of the week, the manager gathers

all the bills, ships them to the main office.

Q And is that your office?

A Yes, sir.

Q And then, do you reconcile in any way these bills, these -- would they be called delivery receipts?

A They are receipts for merchandise received.

Q And does there come a time when your office receives a bill from the various, from a particular supplier as to the deliveries made?

A Yes, they do.

Q And does your office reconcile his bill against your delivery receipts?

A Yes, the bookkeeping department does that.

Q And if there's any -- if there is, the bookkeeping department cannot reconcile it, what happens?

A They wouldn't pay the bill.

Q Well, would you be informed of this?

A Yes, if there's a discrepancy, the bookkeeper would ask me if merchandise had been received or not.

Q Now, if there's no discrepancy, in the normal course of business, would it be to pay the supplier?

A If he's an authorized supplier, he's being paid

for it.

Q And does your office keep records -- excuse me, the records of the bills and your payment to the supplier?

A They do.

Q Now, they are kept in the normal course of business?

A I would say so, yes.

Q With regards to the payment by Waldbaum's to the suppliers of bagels and bialys, how often a month do they pay, does Waldbaum's pay?

A They should be paid weekly.

Q That's the normal procedure, to pay weekly?

A Yes, maybe every two weeks. They should be paid every week.

Q Now, do you know Mr. Benjamin Schwartzberg?

A Yes, I do.

Q Would you point him out, please.

A He's right there.

MR. SHANLEY: Let the record indicate that the witness is pointing to the defendant.

Q How long have you known him?

A For as long as I'm working in Waldbaum's.

Q Do you know the names of his companies?

A I beg your pardon?

Q Do you know the names of his companies?

A I know Bialys Incorporated and Star of David Bagel Company.

Q Over the years, have you done business with Mr. Schwartzberg?

A Yes, I did.

Q Are you doing business now with him?

A Yes, sir, I do.

Q In what?

A We buy bagels and bialys from him.

Q Do you know of a company called 21-44 Food Corporation?

A Not now. I knew of them. I knew of them.

Q Directing your attention to the year 1970, did you know of them in that year?

A Yes, I remember them. I remember the name and I remember the corporation.

Q Did you recall any particular person who youdealt with in that corporation?

A Well, I would say a fellow by the name of Phil, Phil Reicher.

Q Now, was there a business relationship

between 21-44 and Waldbaum's?

A Yes.

Q In 1970?

A Yes.

Q What did they sell you, if anything?

A They sold me bagels and bialys?

Q Directing your attention to March of 1970, did you purchase any bagels or bialys from 21-44 Corporation?

A I don't remember the exact dates. But I may have, it may have been March. I can't remember dates.

Q Do you recall commencing a business relationship with them on or about that time?

A Yes, for a while.

Q How many stores, do you remember?

A Originally they served me in a few stores up in Westchester.

Q And how was the service in Westchester?

A Fair.

MR. KESTNBAUM: Your Honor, I haven't objected to any preliminar questions. But I object to this line of questioning now. It's irrelevant and confusing.

THE COURT: No, I don't think it is, in

view of the opening and evidence elicited on cross by you.

Go ahead.

BY MR. SHANLEY:

Q Now, Mr. Pitt, directing your attention again to 1970, in the spring of 1970, were you doing business with Mr. Schartzberg at that time?

A Yes, I was.

Q Did you -- you were doing business with him in Queens?

A I did.

Q And do you recall any of the stores that you were doing business with him at that time in Queens?

A I can't remember the numbers of the stores. We do business with many bagel and bialy people in the various area. But I would say, 58, 55, 53, 91, 90.

Q Forty-one?

A Forty-one.

Q Were these good locations? Well, were they good volume?

A Not too much; fair, I don't know.

Q I hand you Government's Exhibit 18 for identification, a brown bag, containing numerous documents attached to each other, and I'd ask you to look

through them. Please keep them in order.

(Handed to the witness.)

Q Have you looked through them before?

A Yes, I did.

Q You looked through them in my office; is that correct?

A I did.

Q And what are all those -- what is the date of the top document?

A The top is dated January 23, 1970.

Q And is that a check?

A Yes, that's a check.

Q And who is it made out to?

A It's made out to Star of David Bagel Corporation.

THE COURT: Are these for identification?

MR. SHANLEY: They were for identification. I'd like to --

THE COURT: Is there any objection?

MR. KESTNBAUM: No.

THE COURT: All right, mark them in evidence, the whole exhibit.

THE CLERK: Government's Exhibit 18 --

MR. KESTNBAUM: I might say for the record, they have all been shown to me by Mr. Shanley.

MR. SHANLEY: Pardon? I didn't hear.

MR. KESTNBAUM: I believe you showed those. There's no objection.

THE COURT: All right, mark them.

THE CLERK: Government's Exhibit 18 for identification is marked in evidence.

(So marked.)

BY MR. SHANLEY:

Q Now, Mr. Pitt, showing you the first one on this pile of, stack of documents here, that is a check from Waldbaum's is that correct?

A Yes.

Q Dated 1/16/70?

A Right.

Q Who is it payable to?

A Star of David Bagel Corporation.

Q Now, I direct your attention to this attached document, which is the accounts payable transmittal slip?

A Yes.

Q And it has on it a series of numbers; is that correct?

A Yes.

Q What are all these numbers on this page?

A Stores, various stores.

Q The stores that are designated by store number; is that correct?

A Yes.

Q Next to the store number 41, is there a written in figure?

A Yes, $30.36.

Q And that would be the -- what would that reflect?

A That would reflect a week's purchases of bagels and bialys for that store.

Q Next to store number 45?

A That would be $118.46.

Q And next to store number 48?

A That would be $40.41.

Q And next to store number 53?

A It would be $48.95.

Q And next to store number 91?

A It would be $81.92.

Q And those figures that you read, they reflect the sales by Star of David to Waldbaum's for the week ending -- what week would that be?

A That would be the week of January 3rd.

Q 1970?

A 1970.

Q And then this check, the total, what is the total on this check that's sent to Mr. --

A $924.17.

Q That check includes other accounts; is that correct?

A Yes.

MR. SHANLEY: May I have the jury look at this?

THE COURT: You may circulate the document. Are you going to go through each one of these?

MR. SHANLEY: No, no, your Honor.

BY MR. SHANLEY:

Q You have examined these, is this correct, Mr. --

A Yes, I did.

Q And each one of these checks were attached to a transmittal slip and reflect the purchase, delivery and sales of bagels and bialys to Waldbaum by Start of David; is that correct?

A Yes.

Q And you noticed the bottom page of documents is July 16, 1970; is that correct?

A Yes.

Q Check and it's for the -- what period ending?

A It would be 7/16, that's -- "7" is July.

Q July 16?

A July 16, 1970.

Q That's the pay date?

A Right.

Q The accounting date is what date?

A On July 4, 1970.

Q And are stores number 41, 45, 48, 53, and 91, are they on there as having purchased bagels and bialys?

A Yes.

Q For the period ending July 4th?

A Yes.

Q Now, did there come a time in the summer, the early summer of 1970, Mr. Pitt, in which you increased your -- when I say "your," Waldbaum's, Waldbaum's purchasing from 21-44 Food Corporation?

A Yes, I did.

Q And do you recall how many stores you turned over to them?

A Five.

Q You turned over -- how many stores did you turn over in Queens to them?

A I can't be sure of how many in Queens. In Westchester, I remember distinctly. In Queens we added often a few, I don't remember the numbers.

Q With regard --

A 48, 53, I remember, 41. I can't be sure of the numbers. I can't remember.

Q I hand you Government's Exhibit No. 21 for identification and ask you to look at that and see if it refreshes your recollection as to what stores you turned over to 21-44 Food Corporation?

A Yes.

THE COURT: Yes, go ahead. Ask the question.

Q Do you recall which stores you turned over to 21-44 Food Corporation, after looking at this?

A This is the Star of David.

Q Right.

A I see 53 missing here, 48 missing here, 41 -- I would say that's about it.

Q That's four?

A Four.

Q Is there any other that you can recall? If I suggested to you store number 45?

A Yes, that might -- may very well be.

Q Now, do you recall having a conversation with Phil in the early summer of 1970 about doing business with him, Phil of 21-44?

A Well, originally, when I came to Phill --

MR. KESTNBAUM: Your Honor, I object to conversations with Phil and the witness.

THE COURT: Well, I'll allow him to testify to what was said with respect to the amount of supplies, the stores to be supplied. Unless you want to --

MR. SHANLEY: Perhaps, your Honor, I'll withdraw the question. I would like to refresh the witness's recollection as to the number of stores that he turned over to 21-44 Food Corporation.

Q I ask you to read that, which I have, Grand Jury testimony --

MR. SHANLEY: Which I'll mark for identification -- excuse me?

MR. KESTNBAUM: May I have the page number?

MR. SHANLEY: Page number 5.

THE CLERK: Government's Exhibit 49 for identification.

(So marked.)

Q I refer you to page 5 and ask you to read that.

(Witness examines document.)

THE COURT: Yes, proceed.

Q Now, Mr. Pitt, is your recollection now refreshed as to how many stores you turned over to 21-44 Food Corporation?

A Yes.

Q How many were there in June of 1970? How many? Not the names, but just how many?

A Is this it?

Q Well, I'm asking you if your recollection is refreshed?

A It would be ten or more.

Q During the early summer of 1970, in particular June, early July, did you have a conversation with Mr. Schwartzberg?-- Mr. Benjamin Schwartzberg?

A I may have had a conversation with him.

Q Did you have a conversation with him about stores number 41, 45 -- do you recall having a conversation with him about stores number 41, 45, 48, 53, and 91?

A Yes.

Q Was this over the telephone?

A Yes, it was.

Q Could you recount as best you can what he said and what you said?

A Well, what I said was that, as long as he was going upstate --

Q No, conversation with Mr. Benjamin Schwartzberg.

A Well, I was telling Mr. Schwartzberg as long as 21-44 was serving me upstate, it would only be that the people from 21-44, came to me and they asked for additional business in the City, since they were going upstate. And I had agreed with them and I told Mr. Schwartzberg of this here; that come next week or whatever the day might be, we will give him a few stores in the area.

Q What did Mr. Schwartzberg say, if anything?

A Nothing. He was disappointed. He thought he served me well and I shouldn't have done it.

Q Is that all you can recall of that conversation?

A (No response.)

Q Now --

MR. KESTNBAUM: Your Honor, I wonder whether the report has gotten the witness nodding yes, that

that was all he could recall. I think that ought to be in the record.

THE COURT: Yes.

All right, go ahead.

BY MR. SHANLEY:

Q I hand the witness Government's Exhibits 21, 20, 22, and 19 for identification and ask him if he recognizes these exhibits?

A Yes, I do.

Q These are files of Waldbaum --

MR. SHANLEY: Counsel?

MR. KESTNBAUM: Put them in.

MR. SHANLEY: Offer them in evidence.

THE COURT: Admit them.

THE CLERK: Government's Exhibits 19, 20, 21, and 22 for identification marked in evidence.

(So marked.)

Q I show you Exhibit 19, in particular the Waldbaum transmittal slip, for the period ending July 11, 1970. What is the figure next to store number 41?

A $2.75.

Q And 48?

A 2.75

Q And 91?

A $5.50.

Q And 53?

A $6.05.

Q Now, I show you Government's Exhibit No. 20, and read the numbers on the transmittal slip. What is the accounting date, the accounting date?

A That would be July 18th, 1970.

Q What are the figures next to 41, with regard to those five stores?

A None, nothing.

Q 41, 45, 48, 53, and 91, does that indicate any deliveries by Star of David?

A No, no.

Q And with Government's Exhibit No. 21, which is a transmittal slip for the following week, are any deliveries by Star of David to Waldbaum's on those five stores indicated?

A No, sir.

Q I show you Government's Exhibit No. 22, accounting date is what date on that?

A August 1, 1970.

Q Is there any figure next to number -- store number 41?

A Yes, there is

Q How much is that?

A $11.

Q Would that be a full week's figure?

A I really can't tell you.

Q How about next to 43?

A None, no.

Q Forty-five?

A $34.91.

Q Ninety-one?

A Right, 91, $31.06.

Q So this transmittal slip indicates that Star of David was doing business again with Waldbaum's in late July; is that correct?

A Yes.

MR. SHANLEY: May I show this to the jury?

THE COURT: You may.

Is there anything else?

MR. SHANLEY: Yes, your Honor. I'd offer Government's Exhibit No. 23 into evidence.

THE COURT: All right, mark it in evidence.

CLERK: Government's Exhibit No. 23 for identification, received in evidence.

(So marked.)

Q Have you, Mr. Pitt, previously examined all of these documents contained in Government's Exhibit No. 23?

A Yes, I did.

Q What did they reflect?

A They reflect the same thing as the other batch.

Q With regard to Star of David?

A Right.

Q The deliveries and sales and ultimate payment to Star of David of the sale of bagels and bialys; is that correct?

A Yes.

Q With regard to the transmittal slip dated, with accounting date, 8/15/70.

A Right.

Q Could you read the figures next to store number 41.

A $23.65.

Q Forty-five?

A 67.36.

Q Fifty-three?

A Fifty-three, 47.85.

Q Forty-eight?

A 38.50.

Q And ninety-one?

A Ninety-one, 53.06.

Q Mr. Pitt --

MR. SHANLEY: Counsel has graciously stipulated and allowed the Government to offer Government's Exhibit 10 into evidence.

THE CLERK: Government's Exhibit 10 for identification is marked in evidence.

(So marked.)

BY MR. SHANLEY:

Q Mr. Pitt, do you recognize Government's Exhibit 10?

A Yes, I do.

Q Now, what is this Government exhibit, what does it consist of?

A This consists of a group of checks paid to the corporation, 21-44 Food Corporation.

Q By whom?

A By Waldbaum's.

Q And the date of the check at the bottom of it?

A It would be August 4, 1970.

Q And the date of the check on the top?

A It would be April 7, 1970.

THE COURT: Checks are being circulated to the jury, Government's 10 in evidence.

BY MR. SHANLEY:

Q Mr. Pitt, did there come a time in late July of 1970 that you had a conversation with Mr. Phil Reicher?

THE COURT: Just yes or no, not anything else.

A Yes, I had a conversation with him.

Q You are not allowed to testify as to the conversation.

Subsequent to that conversation, did you have a conversation with Mr. Schwartzberg?

A Yes, I did.

Q Do you recall whether it was in person or by telephone?

A By telephone.

Q Do you know who called who?

A Well, Reicher had called me, and I called Mr. Schwartzberg.

Q Was there a conversation between you and Mr. Schwartzberg?

A I just told him to resume serving me.

Q And when you said resume serving you, were there any stores in particular that you told him

to resume serving you?

A Well, the stores I had taken away from him.

Q Those are the stores in Queens?

A Right.

Q Do you know their numbers?

A Yes, 41, 48, 53, 89, 90, 81.

Q There's one other one, do you recall the number?

A 90.

Q Was it in Queens?

A Yes.

Q 45?

A Yes

Q Five stores in Queens; is that correct?

A Right.

Q Have you been doing business with Mr. Schartzberg since that day?

A Yes.

MR. SHANLEY: Thank you.

You may inquire, counsel.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Mr. Pitt, you have known Mr. Ben Schwartzberg for how many years?

A For as long as I worked for Waldbaum's.

Q That is about twenty years?

A Close to it.

Q And you have done business with him for twenty years?

A Yes -- yes, I did.

Q Have you always been treated fairly, decently, and honestly by Mr. Schwartzberg?

A Yes, sir, I would say so.

Q You've always got a fair deal in the twenty years you've been doing business?

A Yes, I did.

Q And in the course of those twanty years, you never heard anything bad about him, did you?

A No, I didn't.

Q And you've been in the business of buying bagels and bialys for all of those twenty years; is that right?

A Yes, I was.

Q Now, you have testified that there came a time when 21-44 gave up those five stores?

A Yes.

Q And you had a conversation with Mr. Philip Reicher at the time; is that right?

A Yes.

Q By the way, did you ever hear of a Mr. Philip Reicher referred to as "Phil the Raider"?

A (No response.)

Q You haven't.

Now, did Mr. Philip Reicher tell you why he was giving up these stores?

MR. SHANLEY: Objection, your Honor. The Government was not allowed to inquire into this.

MR. KESTNBAUM: I didn't object to it, your Honor.

THE COURT: I'll allow it, under these circumstances. Go ahead. That's a prior inconsistent statement.

MR. SHANLEY: I would point out, your Honor, that I was attempting to ask the question on direct examination as to the conversation with Mr. Reicher and I was not allowed to.

MR. KESTNBAUM: I didn't object, your Honor.

THE COURT: This is for a different purpose. Reicher was your witness. This is an attack on the credibility of Mr. Reicher, as I understand it.

Proceed.

MR. KESTNBAUM: Yes, your Honor.

BY MR. KESTNBAUM:

Q What did Mr. Reicher tell you?

A Mr. Reicher told me that he will no longer be able to serve these stores; his truck had been demolished or burnt down, I don't remember which he said.

Q Did he tell you anything else?

A Yes, he -- he told me that he has a premonition that it was done by Mr. Schwartzberg.

Q Anything else.

A I can't remember, sir -- yes, I told him, I asked him, would he be back in business, and he told me he wouldn't, and I --

Q So he gave up?

THE COURT: Excuse me. Are you finished your answer, describing the telephone call in full?

THE WITNESS: I would say that's about it.

THE COURT: Now you may question.

MR. KESTNBAUM: Yes.

BY MR. KESTNBAUM:

Q He gave up all of his stops with Waldbaum's, didn't he, in July of '70?

A Right.

Q Now, you testified before a Grand Jury, did you not, on September 9, 1970? Do you remember that?

A I remember testifying in front of a Grand Jury. I don't remember the date.

Q Yes. After you had testified before the Grand Jury, you were interviewed by representatives of the United States Attorney's Office, were you not?

A Yes, I was.

Q You went over your testimony with them?

A Yes, I did.

Q And that was done quite recently, too?

A Yes.

Q All right.

Now, I asked you whether you remembered telling the Grand Jury this on September 9th, 1970.

MR. KESTNBAUM: And I'm reading from page 10 of the Grand Jury minutes.

Q Do you remember this question being put to you and you giving the following answer, under oath, sir?

"Question: Did you have a conversation with Mr. Reicher or anyone else at 21-44 Food Corporation concerning their termination of business?"

And do you remember giving this answer?

"Answer: No, he called me one day in advance and he couldn't get in touch with me that day

and I found I had no service. He tried getting in touch with me. He said he would, if I recall correctly, he tried to reorganize. He had financial difficulties. He tried to reorganize this company, and he said that if it would work out he will serve me, and if it's not going to work out, he would not serve me."

Do you recall that?

A Yes, I do.

Q And in September of 1970, well, that was about two months after the conversation, wasn't it?

A Yes.

Q Your memory was fresher?

A Right.

Q Was that a truthful answer you gave the Grand Jury?

A I think it was.

Q Yes. Did anyone tell you to change that answer in your interviews with the Government since September of 1970?

MR. SHANLEY: Let the record indicate that the witnes shock his head.

THE COURT: Please answer.

A No.

Q Yes?

A I don't know, they didn't.

Q But now that your recollection is refreshed, sir --

A Yes.

Q -- you recall that Philip Reicher told you he was getting out because of financial difficulties; is that right?

A Yes.

Q Now, you took five Queens stops away from Mr. Schwartzberg's company and you gave them to 21-44 somewhere around the end of June of 1970; is that correct?

A Yes.

Q And you gave them other business of other bagel manufacturers, also, didn't you?

A I did.

Q When you took this business away from Mr. Schwartzberg, you say you had a talk with him; is that right?

A Yes, I sort of apologized to him.

Q You apologized to him because he had treated you fairly and squarely?

A That's right.

Q He wanted to know why you took the business

away; is that right?

A Right, that's right.

Q You felt you apologized because of the fair treatment you had gotten from him?

A Right.

Q Now, what was the gross annual business of the five stops that you took from Mr. Schwartzberg and gave to Phil Reicher?

A I really can't give you an exact or honest answer on that, sir. I don't remember. I can't tell you exactly.

Q Now, coming again to your Grand Jury testimony, sir, when your memory was quite fresh in September or 1970.

MR. KESTNBAUM: Page 9, at the foot of page 8.

Q Do you remember this?

"Question: How about the five stores that you gave him that Schwartzberg previously served, what was the business 21-44 Corporation was doing with you? Weren't you taking five hundred dozen a week?

"Answer: Approximately."

Do you remember that?

A Yes.

Q "Question: In each of the stores?

"Answer: I would say somewheres around that amount.

"Question: That is approximately $250 a week in cash gross, approximately a thousand dollars a month?

"Answer: I would say so."

Do you remember that?

A Yes, sir.

Q That was the truth, wasn't it?

A Yes.

Q "Question: Would you agree that it would be $11,000 or $12,000 a year; would that be the correct gross business that you were doing or would have done with 21-44 Food Corporation?

"Answer: In some of these stores we sell much less. With the evidence of retail bagel shops around, we probably sell less than in the outlying sections. I would say it would amount to that much money.

"Question: Approximately, to $11,000 a year gross?

"Answer: Yes."

A Yes.

Q And your answers were truthful to those questions; is that right?

A Yes.

Q And if any one would have said or were to say now that that business amounted to $25,000 a year, that statement would not be accurate, would it?

A That's right, it wouldn't be accurate.

Q It wouldn't be truthful at all?

A No.

Q That would be more than twice the actual business, wouldn't it?

A Yes.

Q Do you know what Mr. Philip Reicher testified to regarding the gross annual business?

A No, sir.

THE COURT: All right.

Q Now, you've spoken about, with relation to your records, business you did with Mr. Schwartzberg's companies, in the year of '70? You've given testimony; is that right?

A (No response.)

Q Do you recall whether or not you would have a weekly special of bagels?

A Yes, very often.

Q That would be about a week a month?

A I would say so.

Q That would bring in an unusual amount of business?

A Yes, sir.

Q Much more business than you normally do?

A Yes.

MR. KESTNBAUM: That is all.

THE COURT: Anything further?

MR. SHANLEY: Just one question.

REDIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Pitt, the way to figure out exactly how many dollars and cents volume for the stores we're talking about would be to add all these transmittal slips up?

A Yes, sir.

Q Then you would get an exact amount?

A Right.

MR. SHANLEY: Thank you.

THE COURT: Thank you, sir.

Next witness.

THE WITNESS: Can I leave now, sir?

THE COURT: Yes, sir, we don't need you. Thanks very much for your help.

(The witness was excused.)

MR. SHANLEY: Government calls as its next witness --

THE COURT: Take the witness stand, sir, please.

J O H N B. R E G A N, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: John B. Regan, R-e-g-a-n.

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Regan, please try to keep your voice up so everybody could hear.

What is your occupation?

A Fire Marshal.

Q Employed by whom?

A New York City Fire Department.

Q And where is your area, where is your office I should say?

A 110 Church Street, Manhattan.

Q What's the geographic area you cover?

A Brooklyn and Queens.

Q And how long have you been a fire marshal?

A For nine years.

Q And did you engage, did you take any training to enable you to take over this position?

A Yes, sir. I have had training with the Fire Department, Police Department, and in our own Bureau of Fire Investigation.

Q What did that training consist of?

A To determine the cause and origin of fires and explosions and all ingredients of fire.

Q Approximately how many fires have you investigated during your tenure?

A Approximately twenty thousand.

Q And are part of your duties to come to a conclusion as to whether or not, as to the origin of the fire?

A That is correct, sir.

Q Now, directing your attention to July 17, 1970, did there come a time when you went to 21-44 Utopia Parkway in response to a fire alarm?

A Yes, sir, I did.

Q And what did you observe when you got there?

A A 1970 International Step-van was parked in front of a one-story taxpayer building, and a fire had originated.

Q You saw the van there; is that correct?

A Yes, sir.

Q Did you investigate?

A I did, sir.

Q What did you find? What did you see?

A That a fire had originated in the rear filler-neck valve, filler-neck tank of the gas tank. This is the rear, it's a set-in area where a, where the gas tank neck is enclosed.

Q Now, was the fire extinguished when you arrived?

A Yes, sir.

Q And did you observe anything in the gas tank?

A Yes, sir.

Q What was that?

A Papers.

Q Can you recall, were they newspapers or what?

A No, it was undistinguishable. I couldn't tell what type of paper it was. It was just papers.

Q Where was the gas cap?

A I didn't see the gas cap. It was not there.

Q The tank was open?

A The flap for the tank area, the recessed area, was opened.

Q Now, did you come to a conclusion, or had there been a fire there?

A Yes, sir. The fire had been in this, the paper, what was left of the paper, and extended to the interior of this recessed area and burnt, it caused scorching to the paint.

Q Were you able to come to a conclusion as to the origin of this fire?

A Well, the fire was of incendiary origin, in that an open flame had to be introduced to the area. There was nothing there that would have caused the fire in and of itself, that is, there were no electrical wires or anything there.

Q Now, Marshal, were you able to observe how much gasoline was in the tank?

A Yes, there was approximately half a tank, about ten gallons.

Q Now, are you familiar with the explosive qualities of gasoline?

A Yes, sir.

Q Is there an equation as to the explosive quality of gasoline?

A There is, sir.

Q What is that?

A They equate one gallon of gasoline to approximately nine sticks of dynamite. That is in explosive potential.

Q What is the destructive range of one gallon of gasoline or nine sticks of dynamite?

A Well, structurally it will cause damage to sixty-five feet, and they claim it will break windows up to about three hundred feet.

Q How many sticks of dynamite would ten gallons of gas --

THE COURT: I think we have had enough.

MR. SHANLEY: Pardon?

THE COURT: We have had enough on the explosive possibility.

MR. SHANLEY: May I ask, your Honor, what his opinion would be if the explosion had occurred, what would have happened?

THE COURT: I think we have enough on it.

MR. SHANLEY: Thank you, your Honor.

Thank you, Marshal Regan.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Marshal Regan, you observed paper in the gas tank, didn't you?

A That's correct.

Q Did you remove any of it?

A No, sir, I did not.

Q Would you say that the paper that you observed and found there was the cause of the fire?

A No. The cause of the fire was not the paper itself. Someone burned the paper.

Q Yes, sir. Well, the paper was ignited, wasn't it?

A Yes, sir.

Q And that caused the fire.

By the way, the police had been there before you, had they not?

A That's correct.

Q You knew that the police put out whatever fire there was?

A That's correct, sir.

Q There was no fire when you got there?

A That's correct.

Q You know that to put out the fire it was

necessary to remove the gas tank cap, if it was on; is that right?

A No, sir. The paper was in the filler neck itself. In other words, the cap could not fit over that, otherwise you would put the paper down into the tank.

Q But in any event, you know that the police had put out a fire and that the cap was off; is that right?

A That's correct.

Q And the paper itself showed signs that it had been ignited?

A That's right.

Q How long would that paper burn after it is ignited?

A I don't know how much paper there was there to begin with. I couldn't guess.

Q Well, you saw the remains of the paper, didn't you?

A Right.

Q Would that give you an idea of how much paper there had been?

A I would only be guessing. I don't know. I just couldn't give you a guess.

Q Well, supposing you stuffed the whole neck

full of paper, would that give you an idea?

A No, because the paper had burned on the outside of the neck, not on the inside of the neck. The fire had been extinguished by the time it arrived at the neck of the tank.

Q You couldn't do more than fill it up with paper, could you, Marshal?

A No, of course not.

Q Assuming you would have filled it up and crammed the whole thing full of paper and ignited it, how long could it burn?

A Minutes.

Q Two minutes?

A Well, if it were twisted and placed in there, naturally a paper that's compressed tighter will take longer to burn, rather than just an open sheet of paper.

Q Is two minutes a fair estimate after it's ignited?

A Again, I don't know the condition of the paper at the time of the fire. I just -- I can't hazard a guess.

Q As best you can, knowing as an expert now, sir.

MR. SHANLEY: Your Honor, this is an assumption.

The witness has testified he doesn't know how much paper was there.

THE COURT: I'll permit this next question. Go ahead.

Q As an expert, sir, let us assume that you were trying to get all the paper you possibly could into that neck and then ignite it in some fashion, put a flame to it, ignite it anyway you wished to, you say that would burn for a minute or two?

A Yes, possibly longer.

MR. KESTNBAUM: Thank you. That's all.

MR. SHANLEY: I didn't hear the last part.

THE COURT: "Possibly longer."

Go ahead. Do you have any questions? Thank you, sir.

MR. SHANLEY: One question, your Honor, I'm sorry.

REDIRECT EXAMINATION

BY MR. SHANLEY:

Q If there was another substance besides paper in there, Marshal, which had burned, could it burn longer, if there was a waxed material or something like that, could the fire last for longer than --

MR. KESTNBAUM: Your Honor, I object to

that because there was nothing to show there was anything but paper.

MR. SHANLEY: We are assuming a lot here, your Honor, on cross-examination, and I'm assuming a little bit more.

THE COURT: Was there any evidence of anything other than paper?

THE WITNESS: Sir, I did not remove it from the tank. I don't know.

THE COURT: You don't know whether it was impregnated with anything?

THE WITNESS: No, I don't know.

(The witness was excused.)

THE COURT: Ladies and gentlemen, we're going to take a recess for approximately a half hour or so because I want to choose a jury in another case, so if you want to go down and get a cup of coffee, you may do so.

(A recess was taken.)

AFTER RECESS

(The trial was continued.)

THE COURT: Bring in the jury, please.

MR. SHANLEY: Your Honor, I was wondering if this might be the appropriate time to explain

to the jury some of these commerce documents?

THE COURT: I think we should get the witness out of here so they don't have to stand around.

(The jury entered the courtroom.)

MR. SHANLEY: Government calls as its next witness Stephan Sterman.

S T E P H A N D. S T E R M A N, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Stephan D. Sterman, S-t-e-r-m-a-n.

THE COURT: Proceed, please.

MR. SHANLEY: Thank you, your Honor.

THE COURT: What's the witness's name?

THE CLERK: Stephan Sterman, S-t-e-r-m-a-n.

THE COURT: Your first name?

THE WITNESS: Stephan.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Sterman, how old are you?

A Twenty-three.

Q Please try to keep your voice up so everybody can hear you. What's your occupation?

A Right now I'm a student.

Q Do you recognize anybody sitting in this courtroom?

A Yes, I do, sir.

Q Will you point him out, please.

A The gentleman, Mr. Ben Schwartzberg.

THE COURT: Can you hear back there?

MR. SHANLEY: You have to keep your voice up, please.

THE WITNESS: Okay.

MR. SHANLEY: Let the record show that the witness pointed to Mr. Schwartzberg, sitting at the table, the rear table.

Q Now, directing your attention to the summer of 1970, Mr. Sterman, the spring and summer, 1970, by whom were you employed?

A By Phil Reicher, at 21-44 Food Corporation.

Q Who was your boss or bosses?

A Mr. Reicher.

Q Mr. Who?

A Mr. Reicher.

Q Phil Reicher?

A Right.

Q What was your job?

A I delivered thebagels at night and drove the truck.

Q What was your approximate working hours?

A I would work say from midnight or one in the morning until eight or nine in the morning.

Q And did you have a route, a route?

A I delivered to Queens and eastern Long Island.

Q To where?

A Queens and eastern Long Island.

Q Did you deliver to any Waldbaum's stops?

A Yes, I did.

Q What kind of a vehicle did you use?

A It was an International Harvester Step-in-van.

Q Was there any writing on the van?

A It was, the truck was white and it had, I guess, "Bagel Stop," in big letters on the side and the telephone number of the place and a vehicle number, on the side.

Q Where would you usually park that vehicle?

A I would pick it up in front of the building, in front of the store.

Q And was that in front of the Bagel Stop?

A Right.

Q Do you recall the first time that you saw Mr. Schwartzberg?

A Yes, I do.

Q Could you approximate the date?

A I think it was June 8th of that year.

Q June 8th?

A July 8th, excuse me.

Q July 8th?

A Yes.

Q And what time was this?

A This is about 1 o'clock in the morning, 1 a.m.

Q And where did you see him?

A By the truck in front of the store.

Q How was he dressed, if you can recall?

A He was in a white baker's uniform.

Q Was he there when you arrived?

A Yes, he was.

Q And did you have a conversation with him?

A Yes, we -- he asked --

Q Did you have a conversation?

A Yes, I did.

Q And recount as best you can recall what the conversation was and who said what?

A It was sort of general conversation. He asked me if I worked at the Bagel Stop and if I was a student and what my hours were and just general introductory type

things. He asked me my name.

Q Was there any car parked in the vicinity of the truck?

A Yes, there was, Mr. Schwartzberg's Cadillac.

Q Was it a Cadillac?

A I think it was a Cadillac.

Q At the conclusion of the conversation, what, if anything, did he do?

A I don't recall.

Q Well, you went about your business; is that correct?

A Yes, sir.

Q How long did this conversation last?

A Five minutes, the most.

Q Pardon?

A Five or ten minutes.

Q I take it you went on your route?

A Delivered the route.

Q When was the next time, if any, that you saw Mr. Schwartzberg?

A Two nights later, on the 10th.

Q What time was this?

A That was about 1 o'clock or 1:30.

Q How was he dressed?

A Again in a baker's uniform, white clothes.

Q And where did you see him?

A Again by his car in front of the store.

Q Was he there when you arrived?

A Yes, sir.

Q And was there a conversation at that time?

A Yes. Mr. Schwartzberg asked me if I would like to come with him for breakfast at a nearby diner to speak about the business.

Q Did you go?

A Yes, I did.

Q And did you go into the diner?

A Yes, I did.

Q And did you sit down?

A Yes.

Q With him?

A Yes, sir.

Q And did you have a conversation at that time?

A Yes, sir.

Q Would you tell us what he said and what you said?

A He said that he was a representative of the driver's union, that he was a driver. And that as they

were looking to unionize the Bagel Stop, and asked me to join the union, the driver's union, and discussed how much money, how much additional money I would make if I joined the union and said that if I wished to, he would take me down to the Local in Long Island City to sign up.

Q Did he identify himself as Mr. Schwartzberg?

A I believe so.

Q Did he show you any credentials?

A No, no credentials.

Q What conversation, if any, took place about accounts or stops that you made?

A He --

MR. KESTNBAUM: Your Honor, I object to counsel asking or suggesting anything or asking for anything but a conversation.

THE COURT: I believe he can refresh under these circumstances.

Continue.

A He mentioned that they were interested in unionizing the Bagel Stop because the business was growing and they -- they had picked up the Waldbaum's accounts and now the union was interested in unionizing.

Q What, if anything, did you say to him?

A I told him that I couldn't, I couldn't make a decision at the moment. I'd have to think about it.

Q Did you have occasion to observe the windows of the store that night?

A Yes, I did.

Q What?

A There was --

MR. KESTNBAUM: Just a moment. I object to that, if the Court pleases.

THE COURT: Sustained.

MR. SHANLEY: Well, as far as that, then, your Honor, I take it I cannot pursue what he observed and any conversation about that?

THE COURT: Yes, you could have conversation, if the defendant said anything, I'll hear the conversation and then I'll decide whether or not they should come in.

Go ahead.

Q Did you have a conversation about the windows in the store?

A Yes, we discussed a little bit the trouble.

Q You have to keep your voice up, please.

A We discussed the trouble the store was having, and Mr. Schwartzberg said the night before he was

waiting for me again and that he had seen someone come by and throw a rock through the window; and I live in the neighborhood, and I asked for a description of the person and he gave me the description of a young man with a dungaree jacket.

Q Did he tell you he had called the police?

A He did not.

Q Now, do you recall anything else about that conversation with him that night?

A Not that I recall.

Q How long did the conversation last?

A It was perhaps fifteen minutes, twenty minutes.

Q Then what did you do after that, after the conversation was over, what did you do?

A He drove me back to the store and I delivered the route again.

Q And after you finished your route, what did you do?

A After I finished the route, I went in to deliver the receipts to Phil, to Phil Reicher, and I discussed with him --

Q You went to deliver the receipts?

A Right, into the office to Phil.

Q To who?

A Mr. Reicher.

Q Who, if anybody, did you see in the office?

A Well, at that moment, just Mr. Reicher.

Q Yes?

A And I discussed with him that a union --

MR. KESTNBAUM: I object to this.

THE COURT: Sustained.

Q Did there come a time that you saw somebody in the office?

A Yes, I saw Mr. Reicher. After, after I, when I finished the route, immediately, as usual, I went to deliver the receipts.

Q Do you recall seeing anybody else in Mr. Reicher's office?

A Later in the day I saw Mr. Schwartzberg in the office.

Q And then after Mr. Schwartzberg left, did you engage in conversation with Mr. Schwartzberg and Mr. Reicher?

A No, I just saw them speaking and passed on to go home.

Q And subsequent to observing Mr. Schwartzberg and Mr. Reicher, did you have a conversation with Mr. Reicher?

A I told --

THE COURT: Don't tell us.

Go ahead.

A I told Mr. Reicher --

THE COURT: No.

MR. KESTNBAUM: I object.

MR. SHANLEY: Your Honor, I think this is relevant as to Mr. Reicher's statement to Mr. Sterman. It shows -- I think it's relevant to the case, your Honor. I'll make an offer of proof.

THE COURT: Well, I think I know what is going to be offered, but I don't think it's necessary.

Go ahead.

Q Mr. Sterman, as a result of that conversation, did you learn the name of the man who you had been talking to the previous few nights?

A Yes, I did.

Q What was that name?

A Benny Schwartzberg.

Q Mr. Sterman, did you leave the office that day, eventually?

A Yes, I did.

Q And what did you do?

A I was starting to walk home.

Q What happened, if anything?

A On my way home, Mr. Schwartzberg stopped by with his car and asked if I would either like to be driven home or to the union offices in Long Island City, and I said that I had decided not to join the union and if he wished he could drive me home.

Q Do you recall whether he told you what union this was?

A I had asked him what local union, just out of -- and said it was 802.

Is that the Teamsters?

A Yes.

Q Mr. Sterman, you testified that you drove the International step-van; is that correct?

A Yes, sir.

Q Did there come a time in 1970 that you went to 21-44 Utopia Parkway and observed the step-van in the condition other than it usually was?

A Well, one evening I arrived to find the truck apparently disabled, the side burnt, and I was told that the truck couldn't go out and that it, I had to make the deliveries in Mr. Reicher's private car.

Q So what did you do?

A We loaded up the car as best as possible and made the deliveries. I returned a few times that night to pick up more.

Q And how many trips did you make?

A I think three.

Q Well, you, in other words, you loaded the car?

A Loaded the car, returned, and three times. Usually I would do it once.

Q Did you -- withdrawn. Subsequent to this occurrence this night you have just testified to, did you have occasion to see Mr. Schwartsberg any other time that you can recall?

A No, sir.

Q How close do you live to Main Street in Flushing, how close do you live to 67-21 Main Street?

A I say fifteen minutes by bicycle. I usually go by there to go to Queens College, which I attend.

Q Would you go by that address on your way to work?

A Not on my way to work. The way to school.

Q Did you ever observe anybody on the premises there?

A After, after this was all over, I guess in the fall of that year. I passed by and would see, once or twice, Mr. Schwartzberg in the store.

Q You testified you are twenty-two; is that correct?

A Twenty-three.

Q How old were you in the summer of 1970?

A Twenty.

Q Where were you going to school at that time?

A I was going to day school from fall to the end of the spring.

Q And you are at school now; is that correct?

A Yes, sir.

Q Now, on the morning of July 10th, Mr. Sterman, after you returned from your route, when you testified you saw Mr. Schwartzberg in the office of 21-44 --

A Yes.

Q -- do you recall whether or not you had a conversation with him at that time?

A In the office, no conversation.

MR. SHANLEY: Thank you, Mr. Sterman.

You may inquire, counsel.

MR. KESTNBAUM: Your Honor, may I have this

card marked for identification?

THE COURT: Yes.

THE CLERK: Defendant's Exhibit D for identification.

(So marked.)

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Mr. Sterman, I show you Defendant's Exhibit D for identification and ask you if you recognize this card?

(Handed to the witness.)

A No, sir.

Q What is that card?

A It's a membership to the International Brotherhood of Teamsters card.

Q By who?

A Mr. Schwartzberg.

Q That's in Local 802, the one you are talking about?

A Yes, it is.

Q You saw the card when Mr. Schwartzberg spoke to you about joining the union; isn't that right?

A No, I did not.

Q He told you he was a member of Local 802?

A At that conversation, no, he did not.

Q The Local 802 came up in one of the conversations, didn't it?

A Yes, sir. Yes, sir.

Q And a follow-up conversation to the first one?

A Yes, sir.

Q Is that right? And he told you that he had been a member for some years; is that right?

A No, he did not.

Q You don't recall?

A He did not.

Q He told you he was a member?

A He did not. He told me that the union, that he wished for me to join was Local 802. I don't recall him telling me he was a member of that union.

Q Now, there was a discussion about a broken window at 21-44 Utopia Parkway?

A Yes, sir.

Q And he gave you a description of a young man who broke the window, didn't he?

A Yes, sir.

Q Did you give the police any information about that?

A No, but -- I did not give it to the police, but I asked around, I have lots of friends in the neighborhood, and I asked around to see who it might be.

Q Did you inform Mr. Philip Reicher about that?

A Yes, I did.

Q Do you know whether he told the police?

A I'm not sure.

Q Do you know whether the defendant told the police?

A I do not.

Q You don't know; is that right?

A Yes, sir.

Q In your conversations with him, you didn't refer to notifying the police or not notifying the police; is that right?

A That's correct.

Q But he never mentioned to you that the local he was interested in was Local 802, did he?

A Yes, he did.

Q He did mention it?

A The local he mentioned that he wished I joined was Local 802.

Q That was in the later follow-up?

A I requested of him which union.

Q And he told you?

A Yes, sir.

Q Didn't he also tell you then that he was a member of that local?

A No, sir.

Q Now, when you saw Mr. Schwartzberg in the office of 21-44 Food Corporation, Mr. Reicher was there, too?

A Yes, sir.

Q And they were having a conversation?

A Yes, sir.

Q And do you recall that a check was given to Mr. Schwartzberg?

A I just saw him standing there speaking and I left to go home.

Q You didn't know what the conversation was about?

A I haven't the slightest idea.

Q Did you hear Mr. Reicher order that a check be drawn to the order of Mr. Schwartzberg?

A No, sir.

Q You say that on a subsequent occasion you

passed the Queens Bialy and you saw Mr. Schwartzberg there?

A Yes, sir.

Q Well, that was his place of business, wasn't it?

A Yes, sir.

Q Isn't that where he belonged?

A Yes, sir.

MR. KESTNBAUM: That's all.

THE COURT: Thank you.

(The witness was excused.)

THE COURT: Next witness.

MR. SHANLEY: Government calls Richard Fisher.

R I C H A R D F I S H E R, called as a witness in behalf of the Government, having first been duly sworn, testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Richard Fisher, F-i-s-h-e-r.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Fisher, how old are you?

A Twenty-two.

Q Are you married?

A No, I am not.

Q Go to college?

A I graduated.

Q From where did you graduate?

A Hofstra University.

Q Pardon?

A Hofstra University.

Q When did you graduate?

A June of this year.

Q Did you get any financial assistance to go through college?

A I was on a scholarship and I also worked.

Q How did you obtain -- what did you work at?

A I, most of the time -- in fact, I think the only jobs I had during school were making bagels and working in bagel bakeries.

Q How long have you worked in the bagel industry?

A The first year I worked in the bagel industry was 1966.

Q How old were you then?

A That would make me fifteen.

Q Are you a bagel baker?

A Maker, baker.

Q Now, during the year 1970, do you recall

where you were employed?

A I was employed at two places during 1970, I think: The Bagel Stop and 21-44 Food Corporation.

Q And in particular, in the spring, in June of 1970, where were you employed?

A The 21-44 Food Corporation.

Q And what was your duty?

A I was -- I oversaw the production of all the bagels. I was to make sure that all the bagels that were to be made that day, to make sure that all the ingredients were there, and if they were needed, to be ordered, to tell the boss to order them.

Q Who was your boss?

A Directly and probably Phil Reicher.

Q What were your hours?

A Six in the morning until I finished work, which would be late afternoon, probably.

Q You had a title -- did you have a title?

A Production supervisor.

Q And did there come a time when you delivered?

A Yes.

Q How long would you -- were you a delivery man?

A To the best of my recollection, I think it was about a week. Mr. Steinberg, who was delivering the

bagels, was on vacation.

Q Can you approximate the time, in the month, whatever month it was?

A I think it was the month of July.

Q And what, do you recall any stores that you delivered to?

A I delivered to Dan's, Waldbaum's, a couple of local retail stores.

Q Now, directing your attention to the summer of 1970 when you were working at 21-44, did you have occasion to have a conversation with Mr. Philip Reicher?

A I had many conversations.

Q In particular -- withdrawn. Directing your attention to on or about July 10th, did you have a conversation with him?

A Yes.

Q Who was present?

A Well, in which conversation are you referring to?

Q Well, --

A I -- July 10th, I think, was the date that Mr. Reicher and I arrived at the bakery and the windows were broken that morning.

MR. KESTNBAUM: Your Honor, I object.

Q You observed the windows having been broken;

is that correct?

A That's true.

MR. KESTNBAUM: Your Honor, I object to that.

THE COURT: Well, we have it in now. I don't see that there's anything wrong with fixing a date.

Q Now, with regard to the broken windows, did you have any discussion with anybody about them?

A Yes.

THE COURT: No, don't tell us. Unless it was with the defendant, I'm not interested.

Proceed.

Q Mr. Fisher, have you talked to people in the industry about the reputation of the defendant?

A Yes, I have.

Q How many people?

A Perhaps ten, fifteen, maybe.

Q And what did they tell you of his reputation?

MR. KESTNBAUM: Just a moment. Your Honor, I object to this witness giving testimony.

THE COURT: Only if this witness transmitted information to the people in charge of 21-44 and only that.

MR. SHANLEY: Well, the witness has testified that he has had conversations with people, with

people in 21-44. He worked for 21-44.

THE COURT: If he told them about his knowledge of reputation, I'll take it; otherwise, I won't.

Q Did you tell anybody at 21-44 about your knowledge of Mr. Schwartzberg's reputation?

A Yes, we discussed it.

Q Who did you tell?

A Darryl Steinberg, Phil Reicher, Eugene Steinberg. We all discussed it.

Q What did you tell them, what did you tell his reputation was?

A Well, the discussion centered around his violent reputation.

MR. KESTNBAUM: I object to what it centered around.

THE COURT: What did you say?

THE WITNESS: I said it centered around --

THE COURT: What did you tell them about your knowledge of defendant's reputation, if any?

THE WITNESS: Well, his nicknames and my fear of his --

THE COURT: Tell us what you told them?

THE WITNESS: I told them that he had nicknames such as "Benny the Bomber," and "The Torch."

BY MR. SHANLEY:

Q And anything else as to his reputation, as to his nature?

A That he was violent is what I had heard.

THE COURT: You remember, ladies and gentlemen, what I told you about this. This defendant is not being tried on his reputation or he's not being tried for his violence, if any, or because he has a nickname, if any.

He's being tried only for the specific crime charged here, and this is only coming in on the issue of what was in the minds of those who were running 21-44 Corporation at the time they closed and gave up the Waldbaum accounts.

As you have seen already, one of the issues in the case is whether they closed because of fear of what the defendant did and would do, or because they closed for some other reason, as suggested by some of the evidence that is before you. Is that clear to all of you?

Proceed.

BY MR. SHANLEY:

Q Now, Mr. Fisher, on July 10th, did you have a conversation with Mr. Reicher, some time that day?

A Yes, I'm sure.

Q What did he tell you?

A He had said that, I think, that was the day he had the conversation with Mr. Schwartzberg, and Mr. Schwartzberg had told Mr. Reicher that this was the last gasp --

MR. KESTNBAUM: Objection, your Honor.

THE COURT: Sustained.

Next question.

Q Were you upset?

A Yes.

Q Did you observe Mr. Reicher?

A Yes. We were all upset, scared.

THE COURT: That's all.

Q Did there come a time after this when you -- well, withdrawn.

When you bake bagels, you light the oven in the morning?

A Yes.

Q And did there come a time when you did not light the oven?

A Yes.

Q Will you tell us what you did on that occasion?

A Well, one of my functions was to open the bakery and light the oven, and some time in the middle of July, after the 10th, I went to light the oven and where the mechanics are, where the mechanical pieces are to light the oven, I walked into the oven and saw it was a black box on the side of the oven wall and --

MR. KESTNBAUM: Your Honor, I object to this. I move to strike the answer from the record.

MR. SHANLEY: Your Honor, this goes to the witness's state of mind.

THE COURT: There's no evidence at all, and the defendant is not charged with doing anything with those ovens. Again, it goes to the state of mind of those people and the reasons if they acted as they did act.

Proceed.

Q So what did you do?

A I was not taking any chances at that time. I had not noticed that box before, I had thought, and I refused to light the oven.

I called Mr. Reicher.

Q Was in fact there anything in the oven?

A No.

Q At this point in time, Mr. Fisher, what was

your state of mind?

MR. KESTNBAUM: Your Honor, I object to his state of mind.

THE COURT: Sustained.

MR. SHANLEY: Your Honor, employees and officers --

THE COURT: Only if he mentioned what his state of mind was to the employer. I don't care what his state of mind was.

Q Did you tell anybody how you felt?

A Yes.

Q Who did you tell?

A I discussed it with most of the employees and Mr. Reicher and Mr. Steinberg.

Q How long after this incident -- withdrawn. Did you continue to work at 21-44?

A Around the 15th, I told Mr. Reicher that I was going to take a vacation; that I was in the state of mind where I wasn't going to work there. I said, "I'm going to take a vacation for two weeks," and I did leave.

Q And did you, did you come back later?

A Yes. Two weeks later, and I think that was the day before they closed officially.

Q Did you have any conversations when you

returned with Mr. Reicher or Mr. Steinberg about closing?

A Yes.

Q What did they tell you?

A They told me that --

MR. KESTNBAUM: Your Honor, I object to a conversation.

THE COURT: Yes, sustained.

Q Did you observe their demeanor?

A Yes.

Q What was their demeanor?

A Frazzled.

Q Pardon?

A They were frazzled.

Q Did you ever meet Mr. Schwartzberg, Mr. Reicher?

A Mr. Fisher.

Q Excuse me, Mr. Fisher.

A Not to my recollection.

Q But you heard about him?

A Yes.

MR. SHANLEY: Thank you, Mr. Fisher. No further questions.

CROSS-EXAMINATION

BY MR. KESTNBAUM:

Q Mr. Fisher, you know that there was a lot of

vandalism in the area of Utopia Parkway in 1970, wasn't there?

A What do you mean, in the --

Q Well, there are broken windows all over the place, weren't there?

A In the bakery there was, yes.

Q How about other stores?

A I don't really know.

Q You don't recall?

A No.

Q Well, you passed by them, didn't you?

A As far as I remember, I only remember the broken windows in the bakery.

Q You only remember those?

A Yes, I do. Those were important to me.

Q You don't recall other windows, do you?

A No.

Q You know there was a lot of vandalism in the whole neighborhood, wasn't that common knowledge?

A No.

Q By the way, when did you finally quit working for 21-44 Food Corporation?

A Well, they -- when they closed, that was the end of my employment.

Q Did you go to Alaska?

A No.

Q Ever go up north on a trip?

A Not to Alaska, no.

Q Where did you go to?

A When I went on vacation?

Q Yes.

A To Miami.

Q Miami?

A Yes.

Q Did you go alone?

A Yes.

Q Did you have a female companion?

A No.

Q Now, there was a partner of 21-44 by the name of Levy, wasn't there?

A Yes.

Q Did you tell Mr. Levy about Mr. Schwartzberg's reputation?

A I don't recollect precisely, but I probably did have a conversation with him.

Q You don't -- You have no independent recollection of whether you told him or not, do you?

A Well, Mr. Levy --

Q I asked you whether you have any independent recollection?

MR. SHANLEY: May the witness perhaps explain?

THE COURT: You'll give him an opportunity, I'm certain. In the meantime, let him just answer the question.

A No, no exact recollection, no.

Q But you do have an exact recollection with Mr. Reicher?

A Right.

Q From 1970 to now, you have seen Mr. Reicher from time to time?

A Yes.

Q Have you not?

A Right.

Q You're pretty good friends?

A Right.

Q You've gone over the store with him, haven't you?

A What do you mean?

MR. SHANLEY: Your Honor, I would object to the terminology of counsel on that question.

THE COURT: Sustained.

Q Well, you've talked about this case with him

from time to time, haven't you?

A Yes.

MR. KESTNBAUM: That's all.

THE COURT: Thank you very much, sir -- unless you have some redirect, do you?

MR. SHANLEY: I have no redirect.

THE COURT: Thank you, sir.

(The witness was excused.)

THE COURT: Next witness.

MR. SHANLEY: Your Honor, my next witness is going to take quite a while.

THE COURT: That's all the more reason not to waste the next six minutes. Bring him in.

MR. SHANLEY: Government calls Mr. Darryl Steinberg.

MR. KESTNBAUM: Your Honor, may we have a short side-bar?

THE COURT: While we are waiting for the witness, yes. We can't have the witness waiting.

(The foregoing side-bar conference out of the hearing of the jury ensued:)

MR. KESTNBAUM: Your Honor, I think I'm entitled to the 3,500 material before a witness takes the witness stand.

THE COURT: You are not, but I wish the Government would do that.

MR. SHANLEY: Your Honor, in this particular case it was an oversight.

THE COURT: All right, he's only be on a few minutes and you can get it at the end of the day.

(Whereupon, the side-bar conference out of the hearing of the jury then concluded.)

THE COURT: Swear the witness, please.

D A R R Y L S T E I N B E R G, called as a witness in behalf of the Government, being first duly sworn, testified as follows:

THE CLERK: State your full name.

THE WITNESS: Darryl Steinberg, S-t-e-i-n-b-e-r-g, D-a-r-r-y-l.

DIRECT EXAMINATION

BY MR. SHANLEY:

Q Mr. Steinberg, please try to keep your voice up so everybody can hear. Be responsive to the questions as best you can.

Now, how old are you?

A Twenty-three years old.

Q Are you single?

A Yes.

Q What is your occupation?

A I'm a bagel baker.

Q And how long have you been a bagel baker?

A About seven and a half years.

Q Did you go to school?

A Yes, I was --

Q Where did you go?

A I went -- you mean college?

Q Yes.

A Student at Sullivan County Community College and Queens Boro Community College.

Q For how long?

A Year and a half.

Q Were you in the Army?

A Yes. I'm currently a member of the 136 Field Service Company Army Reserve, active Army Reserve.

Q Do you belong to a union?

A Yes, Local 50, Bakery & Confectionary Workers of America.

Q What type of worker belongs to that union?

A Well, covers bread bakers, bagel bakers, cake bakers.

Q Now, as best you can recall, will you trace

your employment history for us?

A In the bagel-bialy business?

Q Yes.

A I started working for Queens Bialy; and I worked for Bagel Stop, Inc.

Q Any other companies after Bagel Stop?

A Yes. I'm trying to recall.

Q Did you work for Mr. Schwartzberg at all?

A Yes, I worked for him at Queens Bialy and Star of David Bagels.

Q And then did you work for 21-44 Food Corporation?

A Yes, I did.

Q So most of your employment has been in the bagel and bialy industry; is that correct?

A Yes.

Q Now, directing your attention to the year 1970, by whom were you employed?

A 21-44 Food Corporation.

Q How long were you employed by them?

A From January 6, 1970 to July 29, 1970.

Q What were your duties?

A I was the night manager of 21-44 Food Corporation.

Q And who ran the business?

A Philip Reicher, Eugene Steinberg, and myself.

Q Now, you say you were the night manager. What did you do, what were some of your duties?

A My job was to make sure that the routes were baked, packed, and ready for delivery that night or the following morning; making sure that the retail end of the store was run properly at night, and ordering certain products that we needed to produce the bagels.

Q Now, did you have a route yourself which you went on?

A Yes, I delivered a route after I got done baking and packing it on the route at night. I had a route that I delivered in my own private car, a 1968 Chevy convertible.

Q What time would you normally start work?

A Between 12 and 2 in the afternoon.

Q What time would you finish?

A Between 11 and 1 at night.

Q When would you make your deliveries?

A After I was done at work, after I had locked and closed the store for the night.

Q What time would you eventually get home?

A Between 1 and 2:30.

Q How many days a week would you do this?

A Seven days a week.

Q Now, you said you started work in early 1970 for 21-44; is that correct?

A Yes.

Q Do you know Mr. Hy Lapinsky?

A Yes, I do.

Q Did you have a conversation with him shortly before you started work for 21-44?

A Yes.

Q Where did this conversation take place?

A In front of Star of David Bagels.

Q What did he tell you?

A We were just having general conversation. Mr. Lapinsky knew my father was going into business and he knew I was going to work for him. And he told me not to take any accounts away from Benny Schwartzberg, he didn't want to see me get hurt or my father get hurt.

Q What did you say to him?

A I was kind of stunned. I said "Okay."

Q Do you know of Mr. Schwartzberg's reputation?

A Yes, I do.

Q Did you talk to people in the industry about it?

A Yes.

Q What is his reputation?

A He's known as a violent man and has a reputation for blowing up bagel bakeries.

Q Have any nicknames?

A "Torch," "Benny the Bomber," "The Mad Bomber."

THE COURT: Now, I want to emphasize again, ladies and gentlemen, because it's very important, that this is allowed in for the limited purpose of showing the state of mind of those people who were running the company here, not as evidence that the defendant committed any crime at this time or any other time. Just for that limited purpose.

Proceed.

MR. SHANLEY: Yes, thank you, your Honor.

THE COURT: Any time you would like to break, it's a little after 5, you can do so whenever it's appropriate.

MR. SHANLEY: I think this is a good time.

THE COURT: Any objection?

MR. KESTNBAUM: No objection.

THE COURT: All right. Ladies and gentlemen, I have some cases on tomorrow. I hope I can reach

you by 10:15. So would you come in through the back way and be here at 10:15, please. I'll try to reach you just as soon as I can. Thanks very much. Good night. Don't discuss the case. Keep an open mind.

(The jury left the courtroom.)

THE COURT: Case adjourned to September 20, 1973, at 10:15 a.m.

Have you gentlemen had an opportunity to look at Court's Exhibit 2 and Court's Exhibit 2A?

MR. KESTNBAUM: The Court's charge? Yes, your Honor.

THE COURT: Do you have any objections?

MR. KESTNBAUM: I have no objection.

THE COURT: Mr. Shanley?

MR. SHANLEY: I have looked at it. I would like to look at it again. I looked at it once. Usually, your Honor, I find your charges most fair.

THE COURT: Don't say anything that can be held against you in the Court of Appeals.

MR. SHANLEY: I would like to take a look at them.

THE COURT: Thank you very much, gentlemen. I'll see you in the morning.

morning but we are involved in other matters. I know you understand that.

I may hold you a little late through the lunch hour because I have another case going at the same time with another jury. I hope if you get hungry and want to take a lunch break you will let me know.

Proceed.

DIRECT EXAMINATION

BY MR. SHANLEY (CONT'D.):

Q Mr. Steinberg, we will try to pick up the continuity of yesterday regarding your testimony.

Do you know the defendant Benjamin Schwartzberg?

A Yes, I do.

Q How long have you known him?

A About seven or eight and a half years.

Q What business is he in?

A Bagel and bialy business.

Q What is the company?

A Star of David Bagel and Queens Bialy.

Q You worked for 2144 Food Corporation?

A Yes.

Q Did there come a time when Mr. Schwartzberg did business with that company?

A Yes, approximately February or March '71. He serviced us with bialys.

Q There came a time when he ceased to do business?

A Yes.

Q When?

A Approximately June 30th, the end of June.

Q Where is the Star of David Corporation located?

A 67-11 Main Street.

Q Would you please come over to the map here and identify it; put a circle around it?

(Witness complies.)

Q (Continuing) Now, Mr. Steinberg, where do you live?

A I live at 1244-40 Melbourne Avenue, right here (indicating).

Q How far away from Mr. Schwartzberg's place of business - -

A It is right around the corner.

Q Do you live there with your parents?

A Yes, I do.

Q How long have you lived there?

A Approximately fifteen or twenty years.

Q Have you ever been to Great Neck?

A Yes, I have.

Q Where is Great Neck?

A On the map?

Q Yes.

A Right here, this area (indicating).

Q Have you driven to Great Neck?

A Yes.

Q On how many occasions?

A Ten, twelve times.

Q Would you trace on the map your route to Great Neck from your house?

A You make a right turn off Melbourne on to Main Street, continue up to the Long Island Expressway, make a right on to Horace Harding - -

THE COURT: If this is for the benefit of the jury it doesn't help much. You'd better move closer.

(Exhibit moved.)

Q The circle here, the "X" is where you live?

A Yes, and you go down Melbourne to Main, make a

right, continue on Main Street until I came to Horace Harding Expressway, the service road, Long Island Expressway, make a right on the Expressway and continue on the Expressway until I came to Little Neck Parkway, which is right here (indicating), get off and cut across toward Northern Boulevard or out to Lakeville Road on the Expressway and then cut across down Lakeville Road.

Q Would you just indicate on the map approximately where 2144 Food Corporation was located?

A It is right here (indicating).

MR. SHANLEY: Let the record show he points to a mark "X" 2144 Utopia Parkway.

Q Thank you, Mr. Witness.

Would you please resume your seat?

(Witness complies.)

Q (Continuing) Now, Mr. Steinberg, directing your attention to the spring of 1970, how was business going?

A The business was growing.

Q And what do you mean by "growing"?

A We were picking up more wholesale accounts. The retail was getting better also.

Q Did there come a time when you started dealing with Waldbaum's?

A Yes.

Q Do you recall the approximate time?

A Approximately February or March of 1970 we received three stores in the Bronx and Westchester; Waldbaum's Stores No. 44, 78 and 47; Bronx and Westchester Counties.

Q Now, did there come a time later, after that, when you obtained more Waldbaum accounts?

A Yes. In late June of 1970 we received ten more Waldbaum stores; five in Queens County, the other five were serviced in Nassau.

Q Now, Mr. Steinberg, did there come a time in early summer or in 1970 when you had a conversation with Steve Sapperstein?

A Yes.

Q Was it over the telephone or in person?

A Over the telephone. I was in 2144 Food Corporation and Steve was at his bakery, S & S Bagels.

Q Who called who?

A I don't remember.

Q Was there a conversation?

A Yes.

THE COURT: Try to fix the time more precisely.

Q Can you fix the time?

A Late June, about June 30 or maybe the beginning of July.

Q Describe the conversation as best you can; who said what?

MR. KESTNEBAUM: Objection, if your Honor please.

THE COURT: I don't understand the purpose.

MR. SHANLEY: This goes to this witness' state of mind.

THE COURT: All right. For that limited purpose and in accordance with my prior instructions I will hear it.

Go ahead.

A Steve - - I was talking to Steve and Steve knew we received a new Waldbaum account because he was to serve us with bialys for these new accounts and he knew five of the accounts were Ben Schwartzberg's accounts and Steve gave me words of advice to put locks on the engines of all our vehicles, bicycle chains, because he was in business- -

THE COURT: No.

Q What else did he tell you to do?

15 Steinberg - direct

THE COURT: I don't want particular experiences.

Q What else did he say for you to do, if you recall?

A Put locks and gas caps on the trucks and cars.

Q How about the equipment inside?

MR. KESTNEBAUM: I object to counsel leading the witness.

THE COURT: Yes.

Q Do you recall anything else he told you?

A He told us to check the equipment every morning for possible sabotage and told me to try to deliver at night as little as possible.

Q Anything else?

A He told me to check them out - -

MR. KESTNEBAUM: Objection to counsel leading the witness.

Q Do you recall anything else he said?

A No.

Q What was your state of mind after this conversation?

A I was nervous, apprehensive.

Q You knew his reputation?

A Yes, I did.

16 Steinberg - direct

Q That you have already testified to?

A Yes.

Q Who in the company did you talk to about this?

A I spoke to Phil Reischler and my father and I told Phil as soon as he came back with the new accounts he received, to give back the five stores - -

MR. KESTNEBAUM: Objection to what he told Philip about the accounts.

THE COURT: No, I think this reflects on the state of mind of these people at this point and I will allow it for this limited purpose.

A (Continuing) I told Phily when he came back from the meeting and received the new accounts - - he went to Waldbaum's office in Nassau County and he told me the stores he received and I said "Let's not keep the five accounts that belong to Bennie. I don't want them. I don't need them. It's trouble. It's playing with fire."

Q Did you tell anybody else this?

A Yes, my father.

Q What did your father say?

A My father agreed that we should give up those five stores.

17 Steinberg - direct

Q Do you recall anything else in this conversation?

A No.

Q Do you know a man by the name of Ted Schwartzberg?

A Yes.

Q Who is he?

A Ben Schwartzberg's son; an officer in Star of David and Queens Bialys.

Q Did you have a conversation with him in the summer of 1970?

A Yes, I did.

Q Where did this take place?

A At 2144 Food Corporation.

Q Who was present?

A Just me and Ted Schwartzberg.

Q What was said?

A Teddy had come into the bakery to collect a bill and after he come out of the office he come back in the production area where I was and started to talk to me and he said to me "My father wasn't born yesterday. He knows how to take care of people."

I said "What do you mean?"

He said "My father knows how to take care of

people. We can undercut more than anyone else."

Q How did you react to this?

A I was scared and frightened.

Q Now, did you tell people about this conversation?

A Yes, I talked to my father and Phil Reischler about it.

Q What did you tell them to do?

A I said as before "Let's get rid of the five Waldbaum stores. They are not worth it. Somebody is going to get hurt."

Q Now, did there come a time,Mr. Steinberg, when you were working in the bakery one night and you observed something?

A Yes.

Q Can you approximate the time or the day?

A I believe that is July 9, 1970.

Q What was the time?

A Late evening, approximately 11:00, 11:30; I was working in the bakery, baking in the oven with a kettleman, turning over some words and I heard glass break and I ran out to the front and saw a plate glass window was broken.

I ran to the street. I saw nothing and when I returned to the store I went into the office and I saw that

a plate glass window in the office door was broken also - -

MR. KESTNEBAUM: I ask the court to instruct the jury they are in no wise to determine that the defendant had any connection with those incidents. There is no proof to that effect.

THE COURT: That is so and I so instruct the jury and this is introduced only to show the state of mind of these witnesses and to assist you, if you think it is helpful, in determining why the company terminated its activity and gave up the Waldbaum accounts.

Q Did you make any telephone calls then?

A I called the police. A policeman from the 111th Precinct investigated and made a report.

Q Did you call anybody else, if you recall?

A I believe I called my father and told him what happened.

Q What did your father tell you, if you recall?

A He didn't say anything that sticks in my mind.

Q What did you tell your father, if you recall?

A I can't recall.

Q Now, did there come a time when you made a trip to New Jersey?

A Yes.

Q Do you recall the date of that?

A July 10, 1970.

Q What did you do?

A I went from 2144 Utopia Parkway to Key Warehouse in Jersey City, New Jersey, to pick up ten bags of R-Dex 550.

Q Is that a flour?

A It is an additive to the bagel dough; soy flour.

Q And then what did you do?

A I returned to 2144 Utopia Parkway.

Q Who if anybody was back at 2144 when you got there?

A Phil Reischler and my father.

Q Did you have a conversation with him?

A Yes. We all went into the office and had a conversation.

Q Would you tell us who said what?

MR. KESTNEBAUM: I object to conversations among some people upon receipt of flour.

MR. SHANLEY: It has nothing to do

with the flour, your Honor.

THE COURT: I assume it is being offered on the state of mind issue only and for that purpose I will accept it.

Q Describe the conversation.

A I was the last one to enter the office and I came into the office and I saw Phil and Phil didn't look too good. He looked nervous, pale, and I started talking to him and I said "What's the matter, Phil?" And he told me that Ben Schwartzberg was there while I was gone and told him "This is the last glass accident."

Q What did you say?

A "What?" He repeated and I said "What did he mean" and he said "I don't know but I'm scared."

Q What did you say?

A I said "Let's give back the five Waldbaum's. We are just making trouble by keeping them."

Q What did he say?

A "This is America; free competition. They are our accounts. We got them fair and square and I am not going to give them back."

Q Did your father say anything?

A My father wanted to give them back. He agreed with me. He didn't want to keep the five accounts.

Q Do you recall anything else that was said in that conversation?

A No.

Q Do you recall whether or not you said anything about people getting hurt?

A Yes. I said "Somebody is going to get hurt through this. It isn't worth it."

MR. KESTNEBAUM: Again, I object to counsel's leading and suggesting.

THE COURT: Yes, please do not lead.

Q What did you want to do right then and there?

A Give up the five Queens stores.

Q How long did this conversation last, if you recall?

A About a half-hour; twenty minutes, a half-hour.

Q Then, do you recall what you did after that?

A Went back to work and started baking the night route.

Q While you were baking the night route - -

MR. SHANLEY: Withdrawn.

Q (Continuing) Were you alone in the store at night when you baked the night route?

A No, I was not.

Q Were you apprehensive?

A Yes.

Q Now, Mr. Steinberg, during July, the summer of 1970, early summer, directing your attention to the early summer, 1970, will you trace your purchase of bialys, if you can, for the court and jury?

Who did you buy from in, say, June of 1970?

A The beginning of June - -

MR. KESTNEBAUM: Unless the witness will testify from his own knowledge or books and records I object to this. He was baking bialys. He was not in charge of records.

THE COURT: Well, do you know?

THE WITNESS: Yes, I do.

THE COURT: I will take it.

A In the beginning of June we were buying from two people; wholesale from Queens Bialys and for retail from S & S Bagels.

Q You testified there was a time when you stopped buying from Queens?

A Yes, in June.

Q And then you were buying from S & S?

A Yes, entirely.

Q How long did you continue buying from S & S Bagels?

A For approximately another - - through July, 10 or 11, some time about then and we were not able to get bialys from S & S anymore.

Q Did you attempt to buy your bialys from other people?

A Yes, we called every other bialy bakery we knew and couldn't get them from anybody else.

Q You had to supply Waldbaum's with bialys too, didn't you?

A Yes, we did.

Q Did there come a time when you made your own bialys?

A Yes, I baked my own bialys in the store because we couldn't get them from anybody and Mr. Pitt from Waldbaum's called up and said if we couldn't service - -

MR. KESTNEBAUM: I object to any conversation with Waldbaum's.

THE COURT: Objection sustained.

Q You made bialys?

A Yes.

Q How many days - -

MR. KESTNEBAUM: I object to

what they did in baking bialys.

It is incompetent and irrelevant.

THE COURT: We have it before us.

Make it brief.

Q You did your own bialys for a period of time?

A Yes.

Q And then you started purchasing bialys again?

A Yes.

Q What was the date of that?

A Approximately the 15th or 16th of July.

Q The 15th or 16th of July?

A Yes.

Q At that point you were able to give Waldbaum's proper service?

A Yes.

Q Directing your attention to July, the middle of July, did there come a time when you - -

MR. SHANLEY: Withdrawn.

Q (Continuing) After you saw or heard the window being broken, which you testified to - - in the weeks that followed did you observe the windows in the store?

A Yes, over the next week and a half approximately fifteen to twenty plate glass windows were broken almost nightly.

Q Did you have any conversations with officers or employees about these windows?

A I had a conversation with my father and Phil.

Q What did you say and what did they say?

A We all couldn't understand why the windows were continually getting broken. We were trying to find out.

One day Phil said "Why don't you go pick up a couple of stones near the cemetery, near your house, and let's see if they look like these" and they looked pretty much the same - -

MR. KESTNEBAUM: Objection.

THE COURT: Yes. I don't want anything further from you on stones from cemeteries.

Move on.

Strike all that testimony.

Q Directing your attention to the night of July 16, were you in the store that night?

A Yes.

Q What time did you leave? Did you leave?

A I left the bakery 11:45; between 11:45 and 12:00 or

12:30.

Q Was there anybody on the premises when you left?

A Yes.

Q Who is that?

A Pat Guzzi.

Q Did you make any phone calls before you left, if you recall?

A Yes.

Miss Guzzi was at the store that night and she asked if she could stay there - -

MR. KESTNEBAUM: I object to conversations between Pat Guzzi and the witness,if the court please.

THE COURT: Well, I don't see how he can avoid having it in on credibility of Pat Guzzi. Her bias in the case has been raised and her credibility has been attacked and on the issue of the bias of that witness collateral evidence is permitted. So I am going to allow this/come in only on the issue of the credibility of that young lady.

Q You had a conversation with Pat. What did she say?

A She had a fight with her parents that night and she asked me if she could stay in the store that night and I said I couldn't give that permission but I would call Phil Reischler and ask if he allowed it and he okayed it.

Q You passed that over to Pat?

A Yes.

Q Did you do anything to secure the premises when you left?

A Before I left the store I finished baking the route, shut the oven and kettle down, shut the lights, loaded my car for the route. I had to load the two trucks for the night route and then I locked the bakery up and left.

Q You loaded the truck up, you say?

A Yes.

Q What kind of car did you have, Mr. Steinberg?

A At that time I had a 1968 Chevy convertible.

Q At that time did you have troubles with your car?

A Yes, I did.

Q Would you tell the court and jury - -

MR. KESTNEBAUM: I object to this.

I submit we are going far afield.

MR. SHANLEY: This has relevancy, your Honor.

29 Steinberg - direct

THE COURT: Is this on the state of mind issue again?

MR. SHANLEY: Yes.

THE COURT: All right. I will allow it only for that limited purpose.

A I was continually getting flat tires on my car. After I'd come home and park on my driveway or in front of my house at night and when I would come out in the morning the tires would be flat. One or two tires would have flats.

Q How many flats did you get?

A Fifteen or fourteen flats.

Q Did you observe the punctures in the tires?

A A hole with nothing in it; just a hole in the tire.

Q What did you figure did it?

A An ice pick.

Q During what period of time were you getting these flat tires?

A July to mid-August.

THE COURT: There is no evidence, ladies and gentlemen of the jury, that the defendant had anything to do with these flat tires. You may not find that he did. This is just on the state of mind as to this

30 Steinberg - direct

witness and the other witness in the case.

Q After you made your deliveries where did you go?

A I came home to my house and went to sleep.

Q When you got to your house that night - - we are talking about the early morning of the 17th - - did you see anybody in your house when you got there?

A As soon as I pulled up the block I knew something was wrong. The lights were on in my whole house.

I went in. My father, mother, was up; sister. My mother was getting dressed.

I said "What's wrong?" And my mother said "They caught Benny trying to blow our truck up."

MR. KESTNEBAUM: Objection.

THE COURT: Objection sustained.

Strike that.

Q What did you say?

MR. KESTNEBAUM: Objection.

THE COURT: Unless it dealt with Waldbaum accounts I won't hear it.

Q What did you say? Was your father present?

A Yes.

Q What did you say?

A I couldn't believe it at first and then I said

31 Steinberg - direct

"It's all going back to Waldbaum's. We should have given them back a long time ago."

Q What did your father say?

A My father agreed with me again about giving the stores back and just didn't believe what had happened.

THE COURT: This is only being allowed in on the issue of the state of mind of these people.

Proceed.

Q Did you have any comments to make, if you recall, about the possible physical - -

A I said to my father right then and there, "Isn't it enough already? Let's give back these stores before somebody gets killed."

Q Did you, after this conversation, go anyplace that night?

A No. My mother left the house and went to let Pat Guzzi out of the store.

MR. KESTNEBAUM: I object to where the mother went.

Q Did you go?

A No.

THE COURT: Objection sustained.

Q Did you want to go?

A Yes, I did.

MR. KESTNEBAUM: I object to what he wanted to do.

THE COURT: Objection sustained.

Q Did you go back to 2144 the next day?

A July 17 I went back to 2144, about 5:30, 6:00 o'clock in the morning because I had to cover Phil Reischler's shift in the morning and I had very little sleep that night. I was talking with my father about what happened. I was waiting for my mother to return home.

Q Did you service the stores that night; make deliveries?

A Yes. Our route man was delivering the Long Island route and the night route that is usually done from our truck and Phil Reischler used his car and he was making trips back and forth to Long Island and the store to try and complete the route.

Q During the days that followed this - - incidentally, Mr. Steinberg, did you take any extra measures with regard to your car or other vehicle?

A Well, we continually made sure we safeguarded in the way Stevey had said and we just tried to do the best we could with the truck and try and deliver.

We had to rent a truck to replace the truck we lost.

Q Where did you park the vehicle?

A When I came to work, usually between 11:00 and 12:00, I would park in the lot behind the store and when it started to get dark out I would move my car to the front of the store on Utopia Parkway with bright lights in front because I didn't want damage done or anything to happen to the car.

Q Now, during or subsequent to the truck incident did you have occasion to talk to Phil and your father?

A Yes.

Q On how many occasions?

A Daily talk. We were all in the bakery together.

Q What did you talk about?

A We kept talking about the truck. We were all nervous and afraid.

Q What did you say?

A I kept saying "Give back the accounts. I don't need it. It is only trouble" And Phily kept saying "No, no," but he was starting to weaken on the point.

Q And your father?

A My father continually agreed with me. As soon as I said to give them back the first time he agreed with me straight through.

34 Steinberg - direct

Q Do you recall saying anything about solicitation of other accounts?

A It was common knowledge among the three of us we would all go out - -

MR. KESTNEBAUM: Objection to "common knowledge."

THE COURT: Objection sustained.

Q What did you say?

A When I went out soliciting I wouldn't attempt to take any of Benny's accounts.

Q Did you tell them what would happen if you did?

A To the merchants?

Q No, Phil and your father.

You explained to them why you wouldn't solicit - -

MR. KESTNEBAUM: Objection.

This is leading and I object to the question as to relevancy.

THE COURT: We have the issue of the accounts raised on cross-examination. I will allow limited inquiry on this line.

Q Was there any conversation among you about solicitation of accounts?

A Yes. We wouldn't touch anymore or any of Benny's accounts.

Q How would that affect your growing?

A Then Benny Schwartzberg was one of the largest wholesalers with the amount of accounts we could acquire.

Q What was your state of mind at this point?

A I was nervous and afraid. I was scared.

Q Scared of what?

A Scared of being hurt physically.

MR. KESTNEBAUM: Your Honor, I submit we are going over the same ground time and again.

Q How about your father; what did he tell you?

MR. KESTNEBAUM: Again, your Honor, we have been over that several times.

THE COURT: I think we have sufficient. Objection sustained.

Q What did your father say about the Waldbaum's - -

MR. KESTNEBAUM: Again, the same ground. Objection to that.

THE COURT: Sustained.

Q Did there come a time in the week or so that followed the incident with the truck - -

MR. SHANLEY: Withdrawn.

Q (Continuing) How about Phil? What was his comment now?

A He was scared and he agreed. He still didn't want to give back the five stores but he said he wouldn't take anymore business away from Benny.

Q Mr. Steinberg, with regard to your home and business what did you decide to do; you and your father and Phil?

A Eventually we decided that it was not worth it. We were all too afraid. We didn't want anything else to happen to anybody and we said - - I said "Forget about it, Phil. It is not worth it. Nothing is worth somebody dying over" and he agreed and we closed the business up.

MR. SHANLEY: Your Honor, I'd like to approach the bench.

THE COURT: No.

MR. SHANLEY: I would like to make an offer of proof.

THE COURT: All right.

(Side bar discussion.)

MR. SHANLEY: I would like to inquire of this witness as to the events that took place last night.

37 Steinberg - cross

THE COURT: Was he present?

MR. SHANLEY: He arrived when Mr. Schwartzberg was in the house.

THE COURT: What is he going to say?

MR. SHANLEY: That he was very apprehensive and his father didn't want him in the house.

THE COURT: That is not enough.

What else?

MR. SHANLEY: What his father told me.

THE COURT: No good.

Did he hear Schwartzberg admit he set fire - -

MR. SHANLEY: No.

THE COURT: Then I will not allow it.

MR. SHANLEY: I can't ask him?

THE COURT: No.

(Conclusion of side bar discussion.)

(The following was held in open court.)

MR. SHANLEY: Thank you, Mr. Steinberg.

No further questions.

CROSS-EXAMINATION

BY MR. KESTNEBAUM:

Q Now, Mr. Schwartzberg - -

MR. SHANLEY: It is Mr. Steinberg.

MR. KESTNEBAUM: I am sorry.

Q (Continuing) Mr. Steinberg, there had been a time when you worked for the defendant, Mr. Schwartzberg, or his company, is that right?

A Yes.

Q When was that?

A 1966; '67; '78 and '69, I believe.

Q And you knew the defendant in those years?

A Yes.

Q And you knew his wife?

A Briefly I met her.

Q You knew his son?

A Yes.

Q You even knew his grandchildren; didn't you?

A No.

Q Never met them?

A No - - maybe once in the bakery.

Q You met them once?

A Maybe in the bakery once.

Q Would you tell the court and jury why you

left Mr. Schwartzberg's employ?

A Well, I left him because I didn't get a raise I thought I deserved.

Q Why did you finally leave?

A I finally left because I was fired by Mr. Schwartzberg.

Q Well, didn't you enroll in some college?

A Yes.

Q Isn't that what happened; you left to go to college?

A Yes, but he fired me approximately eight weeks before I left. He let me go. He said he had somebody now and he didn't need me anymore. He had somebody that was there and could work after I left.

Q Did you hold that against him?

A No. I returned to work for him after that.

Q So you had a good working relationship with Mr. Schwartzberg?

A Fairly good.

Q And outside of the fact that you thought at one point you were entitled to more money than he gave you you were happy?

A That and he let me go many times. I wasn't happy but it was a job and I made a living and supported myself.

40 Steinberg - cross

Q And your father worked for Mr. Schwartberg, didn't he?

A For a brief period of time, part-time.

Q And your mother applied for a position as a bookkeeper with Mr. Schwartzberg, did she not?

A No, I don't believe that to be true, Mr. Kestnebaum.

Q You say the business was getting stronger and stronger - - that is, the business of 2144 Food Corporation - - as time went on; is that right?

A It was growing. We were getting more and more wholesale which would in turn make it stronger. The more we baked the stronger it would get.

Q But you were getting stronger?

A We were growing.

Q Things were pretty good, weren't they?

A What do you mean by "pretty good"?

Q Business was flourishing?

A No, it was struggling. Any new business struggles.

Q You were meeting all your bills on time?

A I wouldn't say we were paying daily but we met the bills and paid our bills.

Q Paying when due?

A Pretty much, yes.

Q Do you know how much was owing on the bakery?

A Yes.

Q How much?

A I believe it was about 80, 85, $90,000. It was payable over a four or five year long term note.

Q Certain of your facts, are you?

A Reasonably certain, to the best of my knowledge.

Q Couldn't have been over a hundred thousand dollars, could it?

A On the equipment, it is possible.

Q So you don't know?

A Ninety to a hundred thousand dollars isn't that great a difference.

Q That is only $10,000.

A When you are talking about equipment that each piece costs $25,000 it is not that great a difference.

Q And do you know whether the notes were up-to-date?

A Yes, they were being paid.

Q Being paid promptly, right up to the date; on due dates?

A No, there were a couple that were late.

Q What were the couple that were late?

A I couldn't give you an exact date for each month.

Q Do you know the amounts that were late or

in default?

A No.

Q How about your flour? You were doing business with Standard Milling Company, were you not?

A Yes.

Q Were you up-to-date with them?

A No, we had credit with them.

Q You had credit. How much credit did you have?

A I don't know. I don't recall that.

Q $500.00?

A No - - I don't recall that, Mr. Kestnebaum - -

Q How much flour - -

MR. SHANLEY: Let him finish.

MR. KESTNEBAUM: He said he didn't recall.

Q (Continuing) Do you have anything more?

A I wasn't involved in paying the accounts, per se. I didn't pay accounts payable. I was not overseeing the bookkeeping operation. I was in the production end of the business mainly. I knew the value of the equipment and the arrangements for paying it off because I was involved in the purchase of it.

Q Your father had a one-fifth interest in

this corporation?

A Yes.

Q Was there a Mr. Levy involved with the company?

A Yes.

Q How much interest did he have?

A One-fifth.

Q Have you seen him in court at any time?

A No, I haven't.

Q Did you ever speak to Mr. Levy about Mr. Schwartzberg?

A Not that I can recall.

Q He was one of the partners, wasn't he?

A Yes, he was.

Q You never spoke to him about your state of mind?

A Mr. Levy was not working full-time at the corporation after we got the new Waldbaum accounts.

Q Well, at that time the five partners were not drawing any money, were they?

A That is true.

Q They had not been drawing money for some time; correct?

A Yes.

Q And he had to make a living?

A Right.

Q You know that he was an electrician, don't you?

A Yes.

Q And you also know he had the habit of eating regularly; is that right?

A Yes, so do I and my family.

Q But your father was not drawing money out either, was he?

A Yes.

Q Is that right?

A Yes.

Q Mr. Reischler hadn't drawn money for some time?

A Yes.

Q The other partners had not been drawing anything?

A Yes.

Q That goes back for quite some time?

A A couple of months, I believe.

Q Yes.

So for two or more months none of the partners were drawing any money out of the business; right?

A Yes.

Q But they were working. Phil Reischler was working and your father was working and others were working?

A Yes.

Q How about the employees? Were they drawing any money out of the business?

A Yes, they were. They were getting paid their salaries.

Q Every week?

A Yes.

Q Did there come a time when the Labor Department intervened because they were not getting their salaries?

A No, Mr. Kestnebaum.

Q That never happened?

A No.

I believe you are talking about after the corporation was closed.

While the corporation was open there was never any intervention by the Labor Department.

Q After the corporation closed they didn't work for the corporation, did they?

A Correct.

Q Did any wages accrue after the corporation was closed?

A When the corporation was closed there was and the payroll from the week before the corporation was closed and the last week the corporation operated, that had not been paid. I personally made both payrolls out, turned it over to my father who in turn turned over the payroll which was made out, completed with five thousand dollars in accounts receivable checks to Mr. Stempler who said he would pay the employees out of the money.

Q Did he pay them?

A I don't believe that happened.

Q Then some Municipal or State Department intervened on behalf of the employees?

A After the corporation closed.

Q And you know that Mr. Phil Reischler was sued and forced to pay the employees?

A Yes.

Q And you also know that Mr. Phil Reischler then turned around and sued one or more of the partners for part of that money; right?

A Yes.

Q How much flour did you require each week in dollar volume?

47 Steinberg - cross

A I don't remember the exact price he paid for flour at that time. Flour fluctuates. But I'd say we were baking approximately a hundred bags of flour a week, I believe.

In a period of time the flour went from 7.50 to $8.00 a bag so it would be between 7750 and $800.00 a week.

Q Would you say the flour account was fairly current; you kept paying it?

MR. SHANLEY: Your Honor, the witness testified he didn't get involved in this aspect of the business.

THE COURT: He may know this.

Q Do you know?

A No, I don't.

Q Do you know that some time in July the corporation went to one of its accounts for more money; do you know that?

A If you could be more explicit - -

Q Did you ever hear of Philip Sorro?

A Yes.

Q Do you know if the corporation went to him?

A I went to Mr. Sorro. I made a phone call to Mr. Sorro. I asked for $3,000. He asked my checking account number and he put the $3,000 in my bank account.

Q He trusted the company for it?

A Yes, he did and approximately three weeks or a month later he came to the corporation and asked the members to sign a promissory - - the corporation members to sign a promissory note.

Q Did you discuss that incident with Phil Reischler at all?

A What incident?

Q The loan from Phil Sorro?

A I told Mr. Reischler that I called Mr. Sorro and I asked him for $3,000 and he gave it to us.

Q Do you know - - you know Mr. Reischler testified here?

A Yes.

Q Do you know that he testified that on the date of this note he borrowed $3,000 from Sorro?

A I don't know that, no. I wasn't here when he testified, Mr. Kestnebaum.

Q Now, you say that Teddy, the son of the defendant spoke to you on one occasion after you took the Waldbaum's accounts?

A Just before we started to service them.

Q And he said to you "You're going to be sorry for this. You don't know what you're in for"?

A No.

Q What did he say?

A "My father wasn't born yesterday. He knows how to take care of people. He knows how to undercut."

Q That you took as a threat?

A Yes.

Q That really scared you?

A It did.

Q Scared you very much in fact?

A Scared me enough to tell Phil again that we should not take those five accounts.

Q You told Phil "I spoke to Teddy and he said he knows how to take care of people and I'm scared"?

A No. I just told Phil "We are playing with fire. Let's not take the accounts."

Q Did you report to Phil that Teddy said "We know how to take care of people"?

A Did I tell that to Phil?

Q Yes.

A I don't recall directly saying it to him.

Q You do recall testifying before a grand jury in this case?

A Yes.

Q July 29, 1970?

A Yes.

Q That was the very same month this alleged incident happened, wasn't it?

A Yes.

Q Your memory was good and fresh then, wasn't it?

A Yes.

Q You then clearly remembered the conversation you had with Teddy, didn't you?

A I remembered what I said to Teddy, yes.

MR. KESTNEBAUM: I refer to Page 7 of the second set of grand jury hearings.

Q Do you remember that before the grand jury, sir, that you were asked the following questions before the grand jury and gave the following answers?

MR. KESTNEBAUM: Starting on Page 6:

"Q What conversations did you have with him?

"A Well, Teddy came into the place to collect a bill for bialys that he had sold to us through his father's place and he was paid.

"It had seemed he had gotten notification from Waldbaum's chain saying they

were taking away five stores he was servicing. As of Monday he was no longer to service them.

"Q Who was to service them?

"A 2144 Food Corporation was to take over servicing this account.

"Q What did he say?

"A He said to me, 'My father didn't wake up yesterday about servicing accounts and taking accounts away from one another.' He said something to the effect that 'We can undercut more than you can undercut.'

I said 'We haven't undercut you. We just got it because they promised us more accounts."

Do you remember that?

A Yes.

Q Was that testimony truthful?

A Yes.

Q Was that the conversation you had with Teddy?

A Yes, but I also remembered that it was said - - that was a little vague in my mind - - that point, and it came to me at a later point - - the other statement.

Q So, you left that out before the grand jury even though you were called the very same month of the conversation; is that right?

52 Steinberg - cross

A I believe I testified before the grand jury approximately sixteen days later and changed the statement, Mr. Kestnebaum.

MR. KESTNEBAUM: I don't like to take up too much time, your Honor.

THE COURT: Don't rush.

Q I will show you all your grand jury testimony. Read it to yourself and show us - -

THE COURT: No, no.

If you want to tell us that there is something in the grand jury testimony, tell us.

MR. KESTNEBAUM: I hope Mr. Shanley agrees that statement was never changed.

THE COURT: If that is what the record shows we will assume that is so. It can be checked later.

Proceed.

Q You knew the stops of the defendant's business, didn't you?

A Some of them, yes.

Q You knew that he serviced Denise Bakery on Utopia Parkway, 20-03 Utopia Parkway?

A I can't be certain of the address but I know he serviced Denise Bake Shop, yes.

Q On Tuopia Parkway?

A Yes.

Q Within a couple of blocks of 2144?

A Yes, it is.

Q How about Clearview Bake Shop; Willets Point Boulevard?

A Yes, that was one of Mr. Schwartzberg's accounts.

Q Also within a few blocks?

A That's approximately a mile or maybe a little more than a mile away.

Q Well, all right.

Have you ever looked at this map before today?

A Yes, I have.

Q You still say that is a mile?

A I believe so.

Q Do you know that there was an officer named Ward that testified in this courtroom?

A Yes.

Q How about Clearview Appetizing at 160-08 Willets Boulevard? Do you know if the defendant serviced that stop?

A I know he serviced Clearview Appetizing down the block, about three stores from Clearview Bake Shop.

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Q How about the bakery at Francis Lewis Boulevard?

A Yes, a bit further away; probably two miles away, I think - - rough estimate.

Q Your firm employed a full-time bookkeeper, didn't it?

A Yes.

Q And had an accountant come in regularly?

A Yes.

Q Did you have anything to do with the keeping of the records?

A No, the only time I did record-keeping was after the corporation was closed. I made out the last payroll and checked over the weeks before that and turned it over to my father and he turned it over to the attorney.

Q This business was started by five partners you say?

A Yes.

Q Do you happen to know how much each one put in the business?

A Phil Reischler and Charles Naire put in $10,000; Irving Teitel, $8,000 and at a later date Steve Levy put in $8,000 and my father put in $8,000.

Q That was the total capital with which

55 Steinberg - cross

the company started to do business?

A I believe so, yes.

Q Then, it incurred debts running to about 150, $200,000; machinery, equipment, trucks and other expenses?

A I don't know the exact figure.

Q Now, on July 10, did you know that Mr. Benjamin was in your place of business at 2144? You know that, don't you?

A I did not see him there but Phil Reischler told me he was there.

Q Do you know Phil Reischler told you he was there to collect on a check issued by your company in the sum of $62.60 which bounced for insufficient funds? He told you that, didn't he?

A Yes.

Q And he also told you that Mr. Schwartzberg was in to collect on that?

A Yes.

Q So then you know that Mr. Schwartzberg finally got his $62.00 some weeks after the issuance of that no-good check - -

A I don't know when the check was issued.

Q Well, let me show you Defendant's Exhibit B

in evidence and see if that will refresh your recollection.

(Document handed to witness.)

Q (Continuing) Do you note the date of the notice by the bank; the green notice?

A The green one?

Q Yes.

When was the check returned for insufficient funds?

A 6/24/70.

Q So, the check was issued some days before that, wasn't it?

A It would have been that day because Teddy came to collect the account usually. That's the way business was done, usually done. We used to settle up with S & S Bagels & Bialys and they would give us a statement and we'd settle with the driver.

Q You believe this check was issued 6/24/70; given to Mr. Schwartzberg on that day; that he deposited it in his bank and went to your bank and it was returned for insufficient funds all on the same day?

A That's not what I said, Mr. Kestnebaum.

Q What did you say?

A That a check could have been issued and given to Mr. Schwartzberg on the same day. That is a common

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occurrence in the baking business.

Q What same day?

A I can't tell you because the check isn't there. You are showing me the date it was returned by the bank. If I would see the check, the date on the check, I could tell you how long it took.

Q From your experience as a businessman - -

A Yes?

Q (Continuing) - - do you understand that a check can be issued, deposited, given to another bank and bounced all on the same day?

A No, a check cannot clear in one day but you asked me if I knew how old the check was and I said if I could see the check I could tell you how old the check was.

Q Let's not bog down.

You know it was prior to June 24?

A Probably.

Q Probably?

That's the date.

A Yes.

MR. KESTNEBAUM: No further questions.

THE COURT: Any redirect?

MR. SHANLEY: No redirect, your Honor.

THE COURT: Step down, sir.

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Call your next witness.

MR. SHANLEY: Your Honor, under normal circumstances I had considered resting at this time but I would now like - -

THE COURT: Do you have that other witness available?

MR. KESTNEBAUM: I will have him at 2:00.

Without prejudice to Mr. Shanley's case I do have one or two witnesses who are anxious to get away.

THE COURT: All right then.

Subject to the government's permission to re-open the case for the other witnesses the government's case is considered closed and I will hear the motions later and I will hear the defendant's witnesses at this point.

MR. SHANLEY: I would like the record to show that I do not intend to close at this time. I seek to obtain testimony of another witness.

THE COURT: I understand, but he is not here and we have defense witnesses waiting and we will proceed with that.

You will be given the opportunity to re-open after the other witnesses testify and the defendant's motion will be reserved until the witnesses' testimony is in.

MR. KESTNEBAUM: I call Steve Levy.

S T E V E N M I C H A E L L E V Y , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q What is your business or occupation?

A I am an electrician.

Q Prior to that what did you do for a living?

A I was in 2144 Food Corporation, an officer.

Q And were you one of the five stockholders?

A Yes, I was.

Q And how much did your interest amount to?

A $8,000 cash.

Q You had approximately a fifth of the company?

A Yes, on paper.

Q When did you go into the business?

60 Levy - direct

A Approximately three years ago.

Q Who else went in with you?

A Mr. Reischler, Mr. Steinberg, Mr. Naire and Mr. Teitel.

Q Do you know the defendant Benjamin Schwartzberg?

A Yes, I do.

Q Would you point him out, please?

A Sitting right there (indicating).

MR. KESTNEBAUM: Indicating the defendant, Benjamin Schwartzberg.

Q Had you been in the bagel and bialy business previous to 1970?

A In a sense, yes.

Q What sense was that?

A I worked for Mr. Schwartzberg for a period of about four or five months and I also helped Mr. Reischler out frequently in his bagel business on Queens Boulevard.

Q And did you know the reputation of Mr. Reischler in the industry?

A Did I know the reputation - -

Q Of Mr. Philip Reischler - -

MR.SHANLEY: Objection.

MR. KESTNEBAUM: I will withdraw

the question.

Q Did you hear the defendant referred to as vicious?

A No, I did not.

Q Have you ever heard the defendant referred to as 'Bennie the Bomber"?

A No, I have not.

Q Or the "Mad Bomber'?

A I have not.

Q Or other derogatory terms?

A No.

Q What happened to your investment in 2144 Food Corporation, sir?

A I lost it all.

Q Wiped out completely?

A Yes.

Q Did you do any work for the corporation?

A In what sense?

Q At Utopia Parkway?

A I did.

Q What did you do there?

A I was a worker-owner.

Q What sort of work did you do?

A I baked, hired. I fired, made dough, bought, sold --

everything.

Q Did you receive any compensation for your stock and work?

A At the beginning, yes.

Q For how long did you receive this?

A For approximately three months, give or take a month.

Q Then what happened?

A Then we couldn't afford to pay the bosses; the principals.

Q You all did without money?

A In a sense, yes.

Q Do you know how this was paid for -- the machinery you bought?

A I know what machinery we bought. I think it cost $33,000.

Q Did the machinery at 2144 aggregate in cost more than $100,000?

A I'd say so.

When you say "machinery" that's everything in the store?

Q Yes.

A Yes.

Q Do you know whether the payments were kept

up?

A For a while and then - -

Q Until about when?

A Until we couldn't afford to pay anymore which was about, I'd say, four months. Don't hold me to these exact dates.

Q But is this around May of 1970 when you couldn't afford to pay anymore?

A Approximately then.

Q How about bills for flour and other merchandise; were you able to afford to pay for that?

A Not really. In fact, we were - - well, monies were not coming in and we weren't able to pay our bills so we were on COD with most of the outfits.

Q When would you say you were put on a COD basis?

A As soon as we couldn't afford to pay them.

Q May or thereabouts?

A I'd say so.

Q Is it fair to say that 2144 was in serious financial difficulty by May of 1970?

A Yes, it was.

Q Were there discussions about winding it up subsequent to that time?

A Well, I tried to have discussions with my partners. For a period we had small discussions. Myself, I said we should go out. We had our lawyer come down on a Saturday, that day, and he said to pack it up. We needed approximately $100,000 cash money to keep this business alive - -

MR. SHANLEY: Could we fix the time?

Q As best you can, would you fix the time that the company lawyer came down and stated that you needed over $100,000 cash money?

A Say a month and a half, two months before we went out of business - - don't hold me exactly but I remember him coming down. We called him down, had a meeting on a Saturday and he said we needed a lot of money to stay in business.

Q At that meeting at which time some lawyer was present and you were present, who else was present?

A All I can remember off hand was Mr. Reischler and Mr. Steinberg.

MR. SHANLEY: Can we have the name of the lawyer?

THE WITNESS: Are you asking me that question?

Q Do you know the name of the lawyer?

A Mr. Sirrotta - - wait - - I take that back. Now I am not sure if it was the lawyer or accountant but one of them said it.

Q What is the name of your accountant?

A Off hand I forgot. I think it is on record someplace.

Q By the way, did you testify before a grand jury in this case?

A Yes.

Q Have you ever been permitted to read your grand jury testimony?

MR. SHANLEY: Objection to the form of the question. It certainly - - it has certain innuendos.

MR. KESTNEBAUM: No innuendo intended.

Q Have you ever read it?

A My own testimony?

Q Yes.

A No.

Q Were you ever subpoenaed by the government to be a witness in this case?

A No, I was not.

Q Do you know when the government brought you down before the grand jury?

A You are asking me for a time?

MR. KESTNEBAUM: May we have the date of that, Mr. Shanley?

MR. SHANLEY: July, 1970.

Q July, 1970. Does that sound right to you?

A Could be. It was in this building, though.

MR. SHANLEY: I correct myself, Mr. Kestnebaum. I am sorry. It was May of 1971.

Q May, 1971?

A Dates I don't know but I did come down.

MR. KESTNEBAUM: May I see the testimony, Mr. Shanley?

MR. SHANLEY: Your Honor, counsel is making requests here which should be made - - outside the presence of the jury.

THE COURT: Yes.

Come to the side bar with the material.

(Side bar discussion.)

MR. SHANLEY: Counsel knows better than to do that.

THE COURT: What do you want?

MR. KESTNEBAUM: I wonder why the government didn't call him. I had to call him.

THE COURT: Do you think there is information derogatory to the government?

MR. KESTNEBAUM: Yes.

THE COURT: And Brady.

All right. Show it to him.

You shouldn't have asked for it that way.

MR. KESTNEBAUM: I am sorry. I didn't think there would be any argument about it.

MR. SHANLEY: May I have a direction to the jury that the government was not trying to hide anything?

(Conclusion of side bar discussion.)

(The following held in open court.)

THE COURT: The government was not trying to hide anything.

It wouldn't be normal practice to turn over the document before the government consented to hand it over.

Mark it for identification.

THE CLERK: Plaintiff's Exhibit 46 for identification.

MR. SHANLEY: I think it would be a

defendant's exhibit.

THE COURT: Defendant's exhibit.

THE CLERK: Defendant's Exhibit E for identification.

(So marked.)

DIRECT EXAMINATION

BY MR. KESTNEBAUM (CONT'D.):

Q Referring to Page 9 of the grand jury minutes, do you remember having been asked a question referring to the defendant:

"Q Did he tell you what he was doing in the neighborhood at the time the truck was burned?

"A Yes, he did. He told me that he was delivering to one of his stops; delivering bagels or bialys."

Do you remember the defendant telling you that?

A When did he tell me that? When did it say?

Q Page 8:

"Q Did you happen to have any occasion to talk to Mr. Schwartzberg some time after the burning of the truck?

"A Yes, I did."

Does that help fix the date of that conversation?

A Not the date but approximately when.

Q The sequence?

A Right.

Q Now, let me come back again to this meeting where either the accountant or the lawyer for the company said that you needed over $100,000 to stay in business.

Was there a discussion among the partners?

A Not to my knowledge. We had very little discussion about staying in business or going out of business.

Q Were there subsequent discussions?

A Very few.

Q Do you remember any particular discussions?

A No, just in general one discussion which was with Mr. Steinberg when Mr. Reischler was off.

I said to Mr. Steinberg "I think it is about time we went out of business because every week we stay open it would cost a number of dollars - - we have to pay out of our own pocket to the government" - -

MR. SHANLEY: What Mr. Steinberg are we talking about and I would object to

the conversation. It is hearsay.

THE COURT: No. It comes in under state of mind.

MR. SHANLEY: It depends on which Mr. Steinberg.

Q Which Mr. Steinberg?

A When I talk about Mr. Steinberg, it is the father.

MR. SHANLEY: He has not been a witness.

THE COURT: I know but he is a proprietor and there is an issue here of why they closed the store.

MR. SHANLEY: Mr. Eugene Steinberg's credibility isn't at issue.

THE COURT: Only why they closed the store.

Go ahead.

A (Continuing) Mr. Steinberg said he wanted to stay open. He thought it would be a good business but in black and white it was not.

Q Do you recall the last discussion that you engaged in with any of the partners before the business closed up?

A Exact discussions, no.

Q Not the exact discussions but do you remember roughly the time?

A I know it is over two years ago. The time was about - - it was like a few weeks before we went out of business.

Q Was there ever a discussion about going out of business because of the character or reputation of the defendant, Benjamin Schwartzberg?

A None whatsoever.

MR. SHANLEY: Pardon me. I didn't hear the answer.

THE WITNESS: None whatsoever.

Q Did any of the partners at any time say to you or did you hear them say to anyone else that they were afraid of the defendant Schwartzberg?

A No.

Q And you yourself lost $8,000 in this venture?

A Yes, I did.

Q And you lost on all the time you put in?

A Yes.

MR. KESTNEBAUM: Your witness.

MR. SHANLEY: May I have a few minutes, your Honor?

THE COURT: Yes, go ahead.

(Pause.)

CROSS-EXAMINATION

BY MR. SHANLEY:

Q Now, Mr. Levy, when did you stop working for 2144 as a helper or worker?

A When?

Q Yes.

A Say about three or four weeks. Don't hold me exactly.

Q I am holding you to the best of your recollection.

A I will tell you the circumstances. I was not getting paid.

Q I asked you when did you leave.

A Physically leave and never come back?

Q And not work there anymore.

A To the last day.

Q Right through the summer?

A You can call it work. I was there the full summer.

Q Working every day?

A Well, if you want to call it work. I was not working. I was there. You would have to describe "working"

for me. I was there physically.

Q How long each day?

A An hour, two hours, three hours.

Q Seven days a week you were there?

A More or less, yes.

Q Every day you were there for a couple of hours during the day?

A Yes.

Q What would you do while you were there?

A I would sit in the office, answer the phone, do a few odds and ends.

Q Sort of helped out where you could?

A Yes; waiting for my union to call up; for a job.

Q Electrician?

A I wasn't waiting for my - - I was waiting to go back in the union.

Q You are an electrician by trade?

A Yes.

Q How many years have you been an electrician?

A Since 1960.

Q Are you a good electrician?

A Yes.

Q A good baker?

A Yes.

Q You're a good baker?

A It doesn't take much to bake bagel.

Q Do you know anything about the bagel and bialy industry?

A A little bit.

Q Enough to conduct a business?

A I guess not. That's why we're out.

Q Would you know enough to start a business of your own in the industry?

A More or less.

Q You consider yourself an expert?

A No, I don't.

Q Almost an expert?

A No.

Q Do you consider that you don't know anything?

A I know a little bit about the business.

I am not an expert electrician either.

Q So you were there every day for the summer for a couple of hours?

A Yes.

Q Did you have conversations with Darrell during the summer months you were there in 1970?

A Yes.

75 Levy - cross

Q You mentioned Mr. Sirrotta, your attorney. Do you know Mr. Sirrotta is Mr. Schwartzberg's attorney also and has been in the past?

MR. KESTNEBAUM: I object to that. There is nothing in the record to support that question.

MR. SHANLEY: I am asking if he is aware of the fact that Mr. Sirrotta has been Mr. Schwartzberg's attorney.

This is cross-examination.

MR. KESTNEBAUM: If he asked if he knows whether or not I would withdraw the objection.

THE COURT: Rephrase it according to the suggestion of defense counsel.

Q Do you know if Mr. Sirrotta represented Mr. Schwartzberg from time to time?

A I don't know.

Q What is the name of the accountant, by the way?

A Off hand, I don't remember.

Q So every day you'd be in the store during June, July of 1970 and spent a couple of hours there and you would talk to Phil and talk to Darrell and Eugene

Steinberg.

Did Phil ever tell you that he had been threatened; yes or no?

A No, not to my knowledge.

Q He did not tell you that?

A I don't believe so.

I hear all these testimonies now and the allegations. I know nothing of the allegations.

Q Were you in court during the testimony of other witnesses?

A No - - this courtroom?

Q Yes.

A No.

Q I ask you again, during the summer of 1970 did Phil Reischler ever tell you he had been threatened?

A Not to my knowledge.

Q You don't recall?

A I just don't remember if he ever said anything like that.

Q How about Mr. Darrell Steinberg? Did he ever tell you he had been threatened?

A No.

Q Or he was afraid?

A No.

Q He never did?

A No.

Q How often did you see Darrell Steinberg? Would you see him every day?

A Yes.

Q Every day you'd see him and he'd be baking?

A Doing his duties.

Q Pardon?

A Doing his duties.

Q What time would you be in there during the day?

A Different hours.

Q Well, what time?

A 10:00 o'clock, 12:00 o'clock, 9:00 o'clock.

Q In the morning usually?

A Mornings, evenings.

Q And there was Darrell doing his duties. What was Darrell doing?

A Everything that we did; baked, delivered.

Q Did you ever do any delivering; ever deliver bagels, bialys?

A With who?

Q Did you ever deliver bagels or bialys?

A Yes.

78 Levy - cross

Q You acted as a driver upon occasion?

A Yes, I did.

Q This would be part of your job, to sort of help out and do odds and ends; is that right?

A Yes.

Q Do you recall having a conversation with Mr. Phil Reischler in the spring of 1970?

A The spring of 1970?

Q Yes.

A About what?

Q Well, do you recall talking to Mr. Reischler?

A I spoke to him on many occasions.

Q Do you recall talking to Mr. Reischler about deliveries; deliveries of bagels and bialys?

A While we were in business?

Q Yes.

A Deliveries in general or any specific deliveries?

Q Deliveries in general, we'll start off with.

A We also spoke about that because Mr. Reischler's father-in-law, Mr. Teitel, was supposed to get us more stops.

Q Did you ever have a conversation with Mr. Reischler in the spring of 1970 with regard to a specific delivery?

A Off hand I don't know what you are talking about.

Q Perhaps I can refresh your recollection.

Do you recall saying to Mr. Phil Reischler "Why don't we make an insurance drop?

A An insurance drop?

Q Yes.

A No, I don't remember saying anything like that.

Q Do you know what an insurance drop is?

A Insurance drop?

Q Drop.

A No.

Q Do you know what an insurance drop is?

A No.

Q You are under oath, Mr. Levy.

A I never heard the words insurance drop.

Q Do you recall saying to Mr. Reischler "What if we make an insurance drop" and this was in reference to a delivery of bagels and bialys on a particular day?

A No, I still don't know what you mean.

Q Did there come a time in the summer or early summer of 1970 that you were robbed?

A Yes, we were robbed twice.

Q You?

A Yes, I was.

Q On a delivery?

A A delivery to the bank; going to the bank, not a bagel delivery.

Q You were robbed on the way to the bank?

A Yes, right in front of - - on the side of the bank.

Q How did this come about?

A I was making a drop to the bank and I got held up right at the bank. It is all in the police record.

Q By whom?

A A gunman.

Q A masked gunman?

A It is in the police records. I don't remember what I said to the police officers.

Q Do you recall having a conversation with Mr. Reischler about making an insurance drop?

A No.

Q Did you have a conversation with Mr. Reischler - - do you recall any kind of conversation?

A About this insurance drop that you are calling something?

Q Yes.

A No.

Q You don't recall that.

Now, when you got robbed you got insurance

back; is that right?

A Yes, we did.

Q How many times over the past two or three years, past three years have you had conversations with Mr. Benjamin Schwartzberg?

A Maybe three times, four times.

Q Where were you when you had these conversations?

A I spoke to Mr. Schwartzberg in his bakery and yesterday and today.

Q You spoke to him yesterday?

A Yes, I did.

Q Do you recall having a conversation - -

THE COURT: Excuse me.

Is this an appropriate point to break? I think the jury is getting somewhat weary.

MR. SHANLEY: Yes.

THE COURT: Ladies and gentlemen, do not discuss the case. Keep an open mind.

I want you back at 2:00 o'clock but rather than come up here to the regular jury room would you mind reporting to the jury room downstairs and the jury clerk can tell you when I need you because I may be working

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THE WITNESS: At 6:00 o'clock to 10:30.

MR. KESTNEBAUM: 6:00 o'clock?

THE WITNESS: 4:00 o'clock till 10:30.

THE COURT: All right.

Bring in the jury.

(Jury entered jury box at 2:20 P.M.)

S T E V E N M I C H A E L L E V Y , having been previously duly sworn by the Clerk of the Court, resumed the witness stand and further testified as follows:

CROSS-EXAMINATION

BY MR. SHANLEY (CONT'D.):

Q Mr. Levy, how many times in the past three years have you talked to Mr. Benjamin Schwartzberg?

A Approximately four times.

Q Yesterday was one?

A Yes, sir.

Q The day before yesterday?

A No.

Q Yesterday was one, this morning was the second time?

A Right.

Q What were the other two times?

A In his bakery.

97 Levy - cross

Q When was this?

A Off hand - - you have the record, I believe, because I spoke - -

Q I am asking for your recollection.

A I am bad on dates. Say, a year ago - - wait - - two years ago maybe.

Q What year?

A I'm not sure. It is just - - I remember where I was working. I couldn't tell you the date. Maybe a year and a half ago.

Q Was it 1972?

A I am very bad at dates.

Q Well now think and see what you can recollect.

You have a distinct recollection of two conversations.

A More or less.

Q Let's pin it down. Was it 1972?

A I think the summer before last.

Q The summer of 1972?

A I think so.

Q When was the other conversations?

A The same time or within a couple of weeks or a week, I believe.

Q And those are the only times you have seen or talked to Mr. Schwartzberg?

A I believe so.

Q The summer of '72, two occasions and then yesterday and today?

A In the last few years,but when we were in business I spoke to him.

Q Before the unpleasantness in July of - - I am not talking about that but after?

A Yes, approximately four times.

Q What did you talk about this morning?

A Just general questions and answers.

Q Talking about the case?

A Yes.

Q Did Mr. Schwartzberg subpoena you?

A No.

Q He called you?

A Yes.

Q And you called him?

A Yes.

Q You are a friend of his; is that right?

A Yes, I'd say a friend; an acquaintance friend.

Q You came in to testify and tell the truth?

A Yes, I did.

99 Levy - cross

Q What did he tell you - - talking about this last conversation this morning - - what did he tell you and what did you say to him?

A He mentioned something to the effect that there was some testimony given in this trial that were lies. He asked me the same questions and I answered it to the best of my knowledge, the truth, and they were contradictory to the answers he heard.

Q What were the questions he asked?

A One question was the threat - -

Q What? What did he ask you?

A The threat. He was supposed to have threatened somebody and he was supposed to have had a meeting - - we were supposed to have a meeting about the threats. This was alleged at the trial.

Q And he asked you to come in and tell the truth about that?

A Yes.

Q And what else did he ask you about?

A There was another question or two in general.

Q What did you talk about yesterday?

A He asked if I would mind coming in and telling the truth.

Q Did he call you?

A He called my house and then he came over to my house.

Q And you had a conversation with him last night?

A Yes, sir.

Q That is the only time you talked to him about the case, those two times?

A Yes.

Q The other two occasions that you saw him, July 1972 or the summer of 1972, what did you talk about then?

A Just that I heard what was going on.

I went in to buy bagels and I saw him and we discussed what was going on. I asked him - - I didn't know exactly what was going on in general, just by hearsay, by me speaking to Phil - -

Q Pardon?

You had a conversation with him. Tell us what the conversation was about.

A I couldn't tell you exactly what I said, just in general, what was going on. I wanted to know.

Q He wanted to know?

A I wanted to know.

Q Did he tell you what was going on last summer?

A Yes.

Q You have no specific recollection of any conversations at that time?

A No.

Q How about the other occasions?

A Nothing specific, just generally.

Q Those are the only times?

A Yes.

Q Have you ever been to Mr. Eugene Steinberg's house?

A Yes, I did.

Q When was that?

A Oh, again with the dates.

I think after we went out of business.

Q In the fall of 1970?

A Could be. I am not sure of the dates.

Q Do you recall having a conversation with Mr. Eugene Steinberg and Darrell?

A Not anything specific.

I think we discussed something to the effect that the records were all messed up and he was supposed to have had records in his basement that he took from the business. That's all I remember.

Q Do you recall being there in the fall of

1970 and do you recall having a conversation with Mr. Eugene Steinberg?

A I was there. I think his wife was there at the time and I think his mother-in-law.

Q Do you recall telling Mr. Gene Steinberg you had just seen Mr. Ben Schwartzberg?

A Just seen him?

Q Just seen him.

A If it was the statement - -

Q Do you recall saying that?

A No.

Q Do you recall telling Mr. Steinberg that Mr. Schwartzberg told you that he has no grudge against you but he only was mad at Phil Reischler? Do you recall telling Mr. Steinberg that?

A No.

Q Do you recall telling Mr. Steinberg that he was mad at Phil Reischler because he took the business away from him?

A No.

Q You have no recollection of that conversation?

A I just told you what I remember saying but that wasn't in our conversation.

Q You have no recollection of that conversation?

is that correct?

A I told you I spoke to him - -

Q Yes or no?

A I have a recollection of part of that conversation.

Q You have a recollection that Mr. Schwartzberg told you he was mad at Mr. Reischler for taking his accounts?

A No.

Q Directing your attention to the same year, the same period of time, do you recall being at Mr. Steinberg's house again on another occasion?

A Off hand, I couldn't tell you. I could have been there. I have no idea.

Q Do you recall having a conversation with Mr. Darrell Steinberg and Gene Steinberg about Mr. Schwartzberg and the trial?

A No, none.

Q Do you recall telling Mr. Darrell Steinberg the only reason it is a federal case is because the flour is in interstate commerce?

A I never said anything about that because I know nothing about law.

Q Do you recall telling him that Mr. Schwartzberg told you that?

A That wasn't said, either.

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Q It was not said? You have a definite recollection that it was not said?

A Definitely.

Q Do you recall after having that conversation going to Mr. Schwartzberg's office?

A No.

Q Mr. Schwartzberg lives right around the corner from the Steinberg's; is that correct?

A Yes, he does.

Q Do you recall leaving Steinberg's house, going to his office and going upstairs to Mr. Schwartzberg's office?

A No, I do not recall that.

MR. SHANLEY: Excuse me for one minute.

(Pause.)

Q So you have no recollection of these two conversations on separate occasions with the Steinbergs; is that right - - in the fall of 1970?

A I have recollections of the conversations.

Q But your testimony is you never went to Mr. Schwartzberg's office?

A I did go to his office.

Q At that time?

A Whenever I went to Mr. Schwartzberg's office I went

home right afterwards because I had bagels and there was no reason for me to go to Mr. Gene Steinberg's house. I was going to Mr. Steinberg's for a reason. To get something.

Q To pump information from him?

A No.

Q Weren't you going there on Mr. Schwartzberg's behalf to find out what was going on?

A No, I did not.

Q Now, you testified before that you worked in the bakery at 2144 all summer long; is that right?

A Yes.

Q Every day,I think you said?

A Yes.

Q You are sure of that?

A Yes.

Q You testified on direct examination that you never heard Bennie referred to as vicious or "Bennie the Bomber" or the "Torch" and you testified that you had no conversations about the character or reputation of Ben Schwartzberg?

A I could have said something like that to Mr. Reischler because that's what Mr. Reischler - -

Q Do you want to change the testimony?

MR. KESTNEBAUM: Let the witness

106 Levy - cross

finish the answer.

THE COURT. Yes.

MR. SHANLEY: The witness - - your Honor, I asked what he testified to on direct.

Q Do you want to change - -

THE COURT: The witness is entitled to finish the answer. You cut him off in the middle of an answer, I believe.

A (Continuing) When you asked me did I testify or tell the grand jury - -

Q On direct examination with Mr. Kestnebaum you testified that you had never heard him referred to as vicious, "Bennie the Bomber" or "Bennie the Torch."

A On the street, no.

MR. KESTNEBAUM: May we have the question and answer reread?

THE COURT: I think it will go more quickly if you let the witness finish.

Q Do you recall testifying - -

THE COURT: No, no.

MR. SHANLEY: I will withdraw the question and start again.

THE COURT: All right.

MR. KESTNEBAUM: May we have it read?

107 Levy - cross

THE COURT: No, no. Let's not quibble.

Q Did you testify on direct examination in this court that you never heard Mr. Schwartzberg referred to as "Bennie the Bomber" or "The Torch"?

A From the outside, no. But I heard allegations from Phil, Mr. Reischler, on a few occasions.

Q Do you want to change your testimony then?

A This is what I am saying.

MR. KESTNEBAUM: Counsel is arguing with the witness.

THE COURT: I think it is an appropriate question.

Q Now, what would you like to testify to now?

A Say the question again.

Q As to whether you ever heard him referred to as vicious - - well, start with that one.

A Not vicious but Phil did not exactly get along - -

Q I am asking - - please.

MR. SHANLEY: Your Honor, I ask the answer be stricken and I ask the witness be responsive to the question.

THE COURT: Put the question again.

Try to answer the question, please.

THE WITNESS: Did I ever hear of him

being vicious?

Q Referred to.

A On the outside, no.

Q What do you mean by "the outside"?

A Well, my neighbors never called him anything.

THE COURT: No, no. Please don't quibble with the examiner. Answer his question.

A Did I ever? No, I did not.

Q You never heard him - - this is your testimony this morning - - you never heard him referred to as "Bennie the Bomber" or "The Torch"?

A No.

Q And you also testified this morning, earlier in the day, that you never had any conversations about his character or reputation?

A No, I never had any conversations.

Q Do you remember testifying before the grand jury?

A Yes.

Q May 12, 1970. That was the date?

A Umm hmm.

MR. KESTNEBAUM: 1970 - -

MR. SHANLEY: Excuse me. 1971.

Q Do you recall being asked these questions and giving these answers?

"Q Do you know Mr. Schwartzberg's reputation to be in the industry?

"A Excuse me?

"Q Do you know Mr. Schwartzberg's reputation to be in the industry?

"A Very bad reputation" - -

MR. KESTNEBAUM: What page?

MR. SHANLEY: Page 3.

Q "Q When you say 'bad' what do you mean?

"A There are things that went on in the last couple of years that were never proven that he did but he was accused by different people, burning stores and things of that nature."

Do you recall being asked those questions and giving those answers?

A If it is written I must have said it.

Q Was that a true statement?

A True in the sense - -

Q Was it true?

MR. KESTNEBAUM: I believe the witness is entitled to give a full answer.

Q You testified on direct - -

110 Levy - cross

THE COURT: Excuse me. There is an objection. Mr. Shanley.

The objection is overruled. I think it calls for a yes or no answer.

A Can you state that again, please?

Q Was that a true statement that you made before the grand jury under oath in this building?

A If - - it's the truth of what I heard.

Q You heard?

A Right.

MR. SHANLEY: Page 5, the following questions and answers:

"Q Do you remember conversations you had with Phil Reischler and others on or about that time?"

Referring to July of 1970.

"A Yes.

"Q What was the general consensus of opinion?

"A Well, we thought maybe it could be him."

Meaning Mr. Schwartzberg.

"Q Why did you think that?

"A Being we took some stores away and

111 Levy - cross

this was his method of operation.

"Q Was there any comment either out loud or in your mind generally concerning Ben Schwartzberg's reputation in the industry?

"A Yes, there was.

"Q Was there any indication that Ben Schwartzberg was capable of doing this?

"A Anybody is capable of doing it.

"Q Was Ben particularly capable?

"A Yes, he was on the top of our minds.

"Q Did Philly Reischler indicate to you and the others that he was nervous about what could possibly happen to his store and business?

"A We were all nervous because that was our livelihood of course and we just - - something went wrong and we just prayed it wouldn't happen again."

Did you give those answers in response to those questions?

A Yes, I did.

Q Was that the truth?

A It is the truth in the sense - -

Q Was that the truth?

A Of what I heard. The truth of what I heard.

Q You don't like Phil Reischler, do you?

A He is a friend of mine.

Q Is he still a friend of yours?

A Yes.

Q Now, you have had time to think, Mr. Levy: How many times over the past couple of years, two years, have you seen Mr. Schwartzberg and talked to him?

A I told you, four times.

Q Apparently, Mr. Levy, since the time you testified before the grand jury and the time of your direct testimony this morning you forgot about Mr. Schwartzberg's reputation; is that right?

A I guess so.

Q When did you forget; do you recall?

A What do you mean?

Q When did you forget about his reputation?

A The time that I went before the grand jury - -

Q When did you forget about his reputation?

A Between the grand jury and now.

Q Can you approximate the year?

A No.

Q Was it 1972?

A Can I explain something?

113 Levy - cross

Q Was it 1972?

A I don't know.

Q When did you forget that you knew his reputation in 1971?

A I don't know the date. A lot of things happened - -

MR. SHANLEY: Thank you, Mr. Witness.

THE WITNESS: Can I explain?

MR. SHANLEY: Excuse me, your Honor.

(Pause.)

Q I take it you never socialized with Mr. Schwartzberg?

A No, I did not.

Q You came up here because you wanted to do the right thing?

A Yes.

MR. SHANLEY: I have no further questions.

REDIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q Now,Mr. Levy, you testified this afternoon about certain names and the reputation of the defendant Schwartzberg, have you not?

A Yes, I did.

Q From whom did you hear that?

A Mr. Reischler.

Q When I questioned you this morning and asked about the reputation of the defendant - -

MR. SHANLEY: Your Honor, I object to this. This is not new matter. He testified on direct and the cross-examination was directed to what his testimony was on direct.

THE COURT: I will allow the question to be finished.

Q When I questioned you this morning and asked with reference to the defendant's reputation did you understand my question to mean the outside or Mr. Phil Reischler?

A I took it as the outside.

Q Then, whatever bad you have heard about the defendant came from Phil Reischler?

MR. SHANLEY: I object to the leading. This is his witness.

THE COURT: No.

Go ahead.

Q Is that correct?

A Yes.

115 Levy - redirect

Q By the way, you are aware of the fact there were broken windows in the store on Utopia Parkway?

A Yes.

Q You had a one-fifth piece of this; approximately?

A Yes.

Q How about other stores along Utopia Parkway?

MR. SHANLEY: I object. This is new matter which is not proper for redirect.

THE COURT: You are right but I will allow it.

Go ahead.

Q How about the other stores in the area? Did you notice?

A There was numerous stores with windows broken. We weren't the only ones.

MR. KESTNEBAUM: That's all.

Thank you.

THE COURT: Anything further?

MR. SHANLEY: No. I have nothing further, your Honor.

THE COURT: Thank you very much.

Next witness.

116 Gadman - direct

B A R N E Y G A D M A N , called as a witness, having first been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q What is your business or occupation?

A National general manager of a company that distributes or leases bagel-making machinery.

Q What is the name of that company?

A Thompson Bagel Machine Manufacturing Corporation.

Q Where is their office?

A The home office is in California. The New York office is in Plainview, Long Island.

Q You are in charge of what area?

A National.

Q Does your company sell bagel machinery throughout the country?

A Yes, we do.

Q Did you ever sell any machinery to the defendant?

A Yes, I have.

Q For how long have you been doing business with him?

117 Gadman - direct

A Approximately five years.

Q Did he always pay you?

A Without a question.

Q Do you know people in the bagel industry?

A Just about everybody in the bagel industry.

Q Did you ever hear him referred to as vicious, dangerous, "Bennie the Bomber" or anything like that?

A No, I never have.

Q Now, you are aware of the fact - - by the way, you were doing business with the defendant for three years or five years?

A Five years.

Q You saw him in 1970, did you not?

A Yes.

Q And you saw him in 1971?

A Yes.

Q Did you see him in the summer of 1971?

A Yes, I did.

Q Where did you see him?

A I had seen him in the North Shore Hospital. He was there recovering from a heart attack.

Q Did you take care of his business then?

A Oh, yes.

Q So, there was a mutual trust between the

two of you?

A Yes.

Q Even while recovering from this heart attack?

A Yes.

Q Were you ever called in by 2144 Food Corporation, this, on Utopia Parkway, about machinery?

A Yes - - well, I wasn't called in. They had not incorporated at that time but I had a meeting prior to them going into business with that group of people.

Q Do you recall who you spoke to?

A I can't remember their exact names but Darrell - - I don't remember his last name.

Q Steinberg?

A Yes.

Q Does the name Philip Reischler ring a bell?

A Philip Reischler, Darrell Steinberg's father - -

Q Eugene; is that his name?

A Yes.

Q Do you remember a Mr. Levy?

A No, I don't remember a Mr. Levy but it is possible. There were quite a few of them; at least half a dozen.

Q What was the purpose of your meeting with them?

A We were discussing their planned business venture and whether we would, my company, would be willing to supply them with the necessary equipment and technical know-how to help them establish their business.

MR. SHANLEY: I would object to this line of questioning. I don't see the relevancy of it.

THE COURT: It is used to establish the basic relationship. I will allow it.

MR.SHANLEY: It is also hearsay, your Honor.

THE COURT: Well, no; not in this context.

I take it you are going to move to a critical portion?

MR. KESTNEBAUM: I am going to qualify the witness as an expert in a moment.

Q Do you pass on credit and financing for bagel manufacturers?

A In some instances, yes.

Q Is that throughout the United States?

A Yes.

Q With how many bagel manufacturers do you do business?

A In and around a hundred.

Q Throughout the country?

A Yes.

Q Are you in charge of financing and credit for these hundred companies?

A Yes.

Q It is part of your duties?

A Yes.

Q When you were called in by Phil Reischler & Co., that was the beginning of 1970 or thereabouts?

A In and around that time. I couldn't remember exactly.

Q Did you inquire as to their financial set-up?

A Yes, I did.

Q Do you recall what they told you?

A Well, to the best of my memory they had approximately $50,000 among the group of people I had met with and they were hoping to take a portion of this money and put it down against equipment and leave some surplusage for operating capital.

Q Yes?

A There was another gentleman there that I just - - the name - - Mr. Teitel - - yes, he was present at that

121 Gadman - direct

meeting and was talking from a point of not being involved but being involved. He just wouldn't commit himself as to his position relative to the proposed business but he did say that he was going to assist financially with the set-up of this bagel bakery.

MR.SHANLEY: Same objection, your honor.

THE COURT: I do not want to go into all these details.

MR. KESTNEBAUM: This is just as an expert into the possibility of success of this venture by someone.

THE COURT: Then let's get to it. Let's not get involved with the other people involved.

Q What did you do about the request of these people for machinery on credit?

A We checked into their background and business record and what I could find out as far as general knowledge in the industry and it was my decision at that time that these people were not in the position to take on the venture they were planning to do for a variety of reasons.

Q In your expert opinion was there any - -

MR. SHANLEY: He has not been

122 Gadman - direct

qualified as an expert witness.

THE COURT: For this purpose I will take it.

Q Was there prospective success for them in the bagel business?

A If so, it was slim.

MR. KESTNEBAUM: Thank you.

CROSS-EXAMINATION

BY MR. SHANLEY:

Q You are an expert in buying, selling and making bagels?

A I am an expert in the setting up, design and production of bagels.

Q You have accounts and things like that?

A I put together bakeries all over the United States.

Q Have you got outside solicited accounts?

A Yes, I have.

Q Good.

You testified, Mr. Gadman - - G-A-D-M-A-N?

A Gadman.

Q (Continuing) - - that you never heard about the defendant having a dangerous, vicious reputation; is that correct?

123 Gadman - cross

A That is correct.

Q Would you change your mind if you heard that he spent one year in jail?

MR. KESTNEBAUM: I object to this, your Honor.

MR. SHANLEY: The defendant opened the door as to the reputation.

THE COURT: Ladies and gentlemen, I wonder if you would excuse us to have a private conference for just a few minutes.

(Jury excused at 4:10 P.M.)

THE COURT: Is he a reputation witness?

MR. KESTNEBAUM: No, your Honor, but if the prosecution may introduce evidence for that limited purpose only of showing that he was known, that people heard of him as "Bennie the Bomber" and so on I think I am entitled to show that other people in the industry did not hear of him as that.

What he did in specific instances are immaterial.

THE COURT: Was there any specific question - - I don't have it in my notes - - with respect to the reputation of this defendant?

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MR. SHANLEY: My notes, your Honor, indicate - - and I don't take the most perfect notes in the world - - "Have you ever heard that he had a vicious or dangerous reputation?"

MR. KESTNEBAUM: That's another way of saying he was vicious or dangerous. That is in response to what the prosecution has charged; that he was a vicious man, a dangerous man. I think I had a right to rebut that.

THE COURT: That evidence was allowed in, not to show that he was a vicious man but to show the people operating this shop believed he was a vicious man which is somewhat different.

MR. KESTNEBAUM: From what they heard - - and I am trying to say that they heard wrong or didn't hear that and made it up - -

THE COURT: You are not trying to show he had a good reputation?

MR. KESTNEBAUM: No. I haven't brought that in. I often said "Did you ever hear anything bad about him?"

THE COURT: Isn't that equivalent to asking if he had a good reputation?

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MR. KESTNEBAUM: No. And I am entitled to show that someone in the employ of this company created this reputation.

To the normal man in the industry he was not known as "Bennie the Bomber."

THE COURT: Tell me what your questions are going to be so I have a good idea.

MR.SHANLEY: I am going to ask the witness whether, if he heard of various arrests and convictions of this defendant, whether he would have changed his opinion - - not opinion - - well, yes; his conclusions as to his reputation.

THE COURT: I think we are going to have to get that testimony read back because that may be critical in this decision.

MR. KESTNEBAUM: May I say, I am quite clear that I limited it to the charges that were made that he was vicious, that he was "Bennie the Bomber" and so on and I think I am entitled to show he was not known as being vicious and "Bennie the Bomber."

THE COURT: But you are not trying to establish good reputation?

MR. KESTNEBAUM: Definitely not and I

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wouldn't argue that before the jury either now or on summation.

THE COURT: We will have the direct testimony read to us. My notes do not show general questions as to reputation.

(Record read by reporter as follows:

"Q What is your business or occupation?

"A National general manager of a company that distributes or leases bagel-making machinery.

"Q What is the name of that company?

"A Thompson Bagel Machine Manufacturing Corporation.

"Q Where is their office?

"A The home office is in California. The New York office is in Plainview, Long Island.

"Q You are in charge of what area?

"A National.

"Q Does your company sell bagel machinery throughout the country?

"A Yes, we do.

"Q Did you ever sell any machinery to the defendant?

"A Yes, I have.

"Q For how long have you been doing business

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with him?

"A Approximately five years.

"Q Did he always pay you?

"A Without a question.

"Q Do you know people in the bagel industry?

"A Just about everybody in the bagel industry.

"Q Did you ever hear him referred to as vicious, dangerous, "Bennie the Bomber" or anything like that?

"A No, I never have.

"Q Now, you are aware of the fact - - by the way, you were doing business with the defendant for three years or five years?

"A Five years.

"Q You saw him in 1970, did you not?

"A Yes.

"Q And you saw him in 1971?

"A Yes.

"Q Did you see him in the summer of 1971?

"A Yes, I did.

"Q Where did you see him?

"A I had seen him in the North Shore Hospital. He was there recovering from a

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heart attack.

"Q Did you take care of his business then?

"A Oh, yes.

"Q So, there was a mutual trust between the two of you?

"A Yes.

"Q Even while recovering from this heart attack?

"A Yes.

"Q Were you ever called in by 2144 Food Corporation, this, on Utopia Parkway, about machinery?

"A Yes - - well, I wasn't called in. They had not incorporated at that time but I had a meeting prior to them going into business with that group of people.

"Q Do you recall who you spoke to?

"A I can't remember their exact names but Darrell - - I don't remember his last name.

"Q Steinberg?

"A Yes.

"Q Does the name Philip Reischler ring a bell?

"A Philip Reischler, Darrell Steinberg's father - -

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"Q Eugene; is that his name?

"A Yes.

"Q Do you remember a Mr. Levy?

"A No, I don't remember a Mr. Levy but it is possible. There were quite a few of them; at least half a dozen.

"Q What was the purpose of your meeting with them?

"A We were discussing their planned business venture and whether we would, my company, would be willing to supply them with the necessary equipment and technical know-how to help them establish their business.

"MR. SHANLEY: I would object to this line of questioning. I don't see the relevancy of it.

"THE COURT: It is used to establish the basic relationship. I will allow it.

"MR. SHANLEY: It is also hearsay, your Honor.

"THE COURT: Well, no; not in this context.

I take it you are going to move to a critical portion?

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"MR. KESTNEBAUM: I am going to qualify the witness as an expert in a moment.

"Q Do you pass on credit and financing for bagel manufacturers?

"A In some instances, yes.

"Q Is that throughout the United States?

"A Yes.

"Q With how many bagel manufacturers do you do business?

"A In and around a hundred.

"Q Throughout the country?

"A Yes.

"Q Are you in charge of financing and credit for these hundred companies?

"A Yes.

"Q It is part of your duties?

"A Yes.

"Q When you were called in by Phil Reischler & Co., that was the beginning of 1970 or thereabouts?

"A In and around that time. I couldn't remember exactly.

"Q Did you inquire as to their financial set-up?

"A Yes, I did.

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"Q Do you recall what they told you?

"A Well, to the best of my memory they had approximately $50,000 among the group of people I had met with and they were hoping to take a portion of this money and put it down against equipment and leave some surplusage for operating capital.

"Q Yes?

"A There was another gentleman there that I just - - the name - - Mr. Teitel - - yes, he was present at that meeting and was talking from a point of not being involved but being involved. He just wouldn't commit himself as to his position relative to the proposed business but he did say that he was going to assist financially with the set-up of this bagel bakery.

"MR. SHANLEY: Same objection, your Honor.

"THE COURT: I do not want to go into all these details.

"MR. KESTNEBAUM: This is just as an expert into the possibility of success of this venture by someone.

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"THE COURT: Then let's get to it. Let's not get involved with the other people involved.

"Q What did you do about the request of these people for machinery on credit?

"A We checked into their background and business record and what I could find out as far as general knowledge in the industry and it was my decision at that time that these people were not in the position to take on the venture they were planning to do for a variety of reasons.

"Q In your expert opinion was there any - -

"MR. SHANLEY: He has not been qualified as an expert witness.

"THE COURT: For this purpose I will take it.

"Q Was there prospective success for them in the bagel business?

"A If so, it was slim.

"MR. KESTNEBAUM: Thank you.")

THE COURT: Having heard the direct testimony we have been read by the reporter, I find my notes to be accurate. He did not

make the witness a general character witness for the defendant. He was extremely careful and precise and I am afraid,Mr. Shanley, that question cannot be asked.

Bring in the jury.

(Jury entered jury box at 4:30 P.M.)

B A R N E Y G A D M A N , having been previously duly sworn by the Clerk of the Court, resumed the witness stand and further testified as follows:

THE COURT: The jury will strike that last question from its mind, bearing in mind that the mere asking of a question does not indicate there is predicate for it.

Continue.

CROSS-EXAMINATION

BY MR. SHANLEY (CONT'D.):

Q How long have you been in this job, Mr. Gadman?

A Six years.

Q And you have been - - are you the head man?

A Yes.

Q For the Plainview office as to this

134 Gadman - cross

leasing and selling of equipment?

A Yes. My job takes me all over the United States.

Q Do you report to anybody?

A Yes, the president of the company.

Q So you spend a lot of time traveling?

A Yes.

Q You spend a lot of time selling - - you are selling your product too?

A Yes.

Q Are you an accountant?

A No, I am not.

Q Are you an expert in financial affairs?

A No, I am not.

Q How many meetings did you have with them; with 2144?

A I don't believe any more than two meetings relative to their proposed plans.

Q And they gave you a proposal and you rejected it?

A They had given me their ideas and thoughts as to how they wanted to handle the purchasing and set-up of the bakery and what their grand design was in setting up this business.

Q And you didn't go along with their grand

135 Gadman - cross

design, I take it?

A No, I did not.

Q Did you ever talk to Darrell or Phil after that -- during 1970?

A Well, I had spoken to both of them many times over a period of years at different intervals for different reasons.

Q In 1970 did you ever ask them "I will give you business if you want it. If you want my machinery"?

A Absolutely not.

Q Did you ever tell them, since that 1969 conversation, did you ever tell Darrell or Phil you'd like to do business with them?

A It is a possibility but I cannot remember, yes or no.

MR.SHANLEY: Thank you.

MR. KESTNEBAUM: That's all.

Thank you.

THE COURT: Next witness.

Do you have another witness?

MR. KESTNEBAUM: Yes, here he is.

JACOB H. SCHURMACK, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q Mr. Schurmack, what is your business or occupation?

A I am in sales, bulk flour sales for Standard Milling Company.

Q Are you an officer of the company?

A Yes, I am vice president.

Q How long have you been with Standard Milling?

A About eighteen years.

Q And do you know the defendant, Benjamin Schwartzberg?

A Yes, I do.

Q Can you point him out here?

(Witness complies.)

MR. KESTNEBAUM: Indicating the defendant, Benjamin Schwartzberg.

Q Did you ever hear of a 2144 Food Corporation?

137 Schurmack - direct

A Yes.

Q Do you know the principals of that company?

A Well, I know some of the names but I am not too familiar.

Q Do you know Phil Reischler?

A Yes.

Q The father-in-law?

A I met him once.

Q Do you know Steinberg?

A Yes.

Q Eugene?

A Yes.

Q Do you know Levy?

A Yes.

Q You dealt with the defendant for how long?

A About twenty years or so.

Q Did he always pay his bills?

A Yes, he did.

Q You sell to how many bagel people?

A I guess about 90% of them, all in the business.

Q In the metropolitan area?

A Yes.

Q Did you ever hear the defendant referred to as "Bennie the Bomber"?

A No.

Q As vicious or dangerous?

A No.

Q You never did.

Now, when did you start doing business, if you recall, with the 2144 Food Corporation?

A I guess it must have been about three years ago, about 1970.

Q I show you Defendant's Exhibit A in evidence and ask you if that refreshes your recollection.

(Document handed to witness.)

A Yes.

Q Well, now, that account runs until when?

A It finishes on September 14, 1970.

Q And how much was owing to your company then?

A $5102.30.

Q Now, did there come a time when you put 2144 on a C.O.D. basis?

A Yes, we did.

Q When was that?

A I would say we put them in some time in August, before the end of the year.

Q When they were on a C.O.D. basis how would they pay; cash or check?

139 Schurmack - direct

A Check.

Q Were the checks good?

A No, the checks bounced.

Q What is the balance?

A $5102.30.

Q Was any of it repaid to you?

A I believe one non-sufficient check was paid on the C.O.D. order.

Q But with respect to the particular balance, it is still the same?

A That's right.

Q It has never been reduced?

A No.

Q If I tell you Phil Reischler testified here that he kept making payments to you after the failure of his company would you say that such testimony - -

MR. SHANLEY: That is not what Mr. Reischler testified.

MR. KESTNEBAUM: May I finish?

THE COURT: Go ahead.

Q (Continuing) Would you say such testimony was truthful?

A It is not. The only monies they paid was when we sued them on a not-sufficient check on C.O.D. and the judge

in one of the Brooklyn courts made them pay and they did pay it in installments of $400 each and they never filed a bankruptcy petition.

Q And you never got the payment?

A Not that I know of and I am vice president and I was sales manager at the time.

Q I show you Exhibit C in evidence and I ask you to look at that and would you tell us what that is?

A Yes.

This man called us up who happens to be a large account of ours, Sarro Baking Company, and he said "Send them in a load of flour and if they don't pay you, I will."

Q Did they pay?

A They never paid and I returned the note to Phil Sarro and I never pressed it and if it was paid it was paid to Phil Sarro.

MR. SHANLEY: I ask the answer be stricken.

THE COURT: I will allow it.

Q So your firm became the holder of the note?

A No, he came to me personally and asked me to sue on it and I never did because Phil said he would make a deal for his own $3,000 and what happened to it I don't

know but Standard Milling Company never received a penny of this and neither did I.

Q And it is all still owing to this very day?

A This, yes. I don't know anything about this.

MR. KESTNEBAUM: Nothing further.

CROSS-EXAMINATION

BY MR. SHANLEY:

Q Who gave you this?

A Which one?

Q The $3,000 note.

A Philip Sarro.

Q He gave you that? It was signed?

A Exactly the way it is.

Q When did he give it to you?

A He gave it to me about six or eight weeks after they went out of business.

Q You put him on C.O.D. some time in August? Did you know that they were closed at the end of July?

A Whenever they closed - -

Q Answer the question.

A I don't know what date they closed.

Q Your testimony was that you put them on C.O.D. in August?

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A No - -

Q You'd like to change that testimony?

A To put it on C.O.D. on the last three or four orders, whenever that was, before they closed.

Q Is there anything else you'd like to change?

A No.

Q You are sure.

You do business with Mr. Schwartzberg; is that right?

A I haven't sold him in the last few months.

Q You are a seller to him or you were a seller to him?

A The company was a seller to him and then the last couple of years I personally handled the account.

Q Whose account?

A Mr. Schwartzberg's.

Q Do you know all the accounts you are selling to right now?

A Every account?

Q Yes.

A No.

Q You sell to Bagel Stop?

A We may. We have about eight or nine salesmen in

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the metropolitan area covering a lot of this trade.

Q Is there any way you can check to see if you sell to them?

A Oh, yes. Anything sold in this area there would be a record of it in the New York office.

Q What is your best recollection? Do you sell to Bagel Stop?

A I have no idea.

Q Have you heard of Bagel Stop?

A No.

MR. SHANLEY: Thank you.

Nothing further.

MR. KESTNEBAUM: One or two more questions.

REDIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q Would you look again at Defendant's Exhibit A and see if there are any entries for the month of August you testified to?

A There would be two non-sufficient checks; one of $800 - -

Q What is the date of that?

A It is hard to see the date on it. It is the 12th of something. It could be August. It could be September.

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It doesn't show. The Xerox is very poor on that.

The next one is September 14.

Q Don't you see a ditto here showing it is August again; August 12?

A Oh, yes. The ditto means August 12.

Q So you have two transactions in August and one entry for September; is that right?

A Right.

Actually, you have a remittance here of $427.00. Then it bounced and showed up again.

Q That is the same transaction, a no-good check?

A Or it could have been a C.O.D. that was paid and did clear. It could have been 50 bags and we were paid and one cleared and one was bounced back.

Q Now, the August 12 entry, is that what you took Mr. Reischler to the Criminal Court on?

A Yes.

Q You collected it in the Criminal Court, City of New York?

A Yes.

Q That was some time in August of 1970?

A We didn't get to court until some time in '71.

Q That is when you got your money?

A We got it in partial payments.

MR. KESTNEBAUM: That's all.

MR. SHANLEY: One more question.

RECROSS-EXAMINATION

BY MR. SHANLEY:

Q You got that money?

A That $800.00 we collected.

MR. SHANLEY: Thank you.

THE COURT: Thank you very - -

REDIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q But you didn't get the rest of your money.

MR. SHANLEY: Your Honor - -

THE COURT: Thank you.

Next witness, please.

MR. KESTNEBAUM: I have no more witnesses at this point.

THE COURT: Do you have a witness to call?

MR. SHANLEY: I have a number of documents which I have to explain to the jury.

THE COURT: Of course and you will have

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opportunity to do so. However, do you have any witnesses?

MR. SHANLEY: No.

THE COURT: Government rests?

MR. SHANLEY: Yes, your Honor.

MR. KESTNEBAUM: My motion but I will make it informally later.

I will withhold my motion while the exhibits are going in.

THE COURT:Are you presenting any other witnesses?

MR. KESTNEBAUM: No, your Honor.

The defense rests.

However, your Honor, I will have but one witness. I will have one witness tomorrow morning.

THE COURT: Can't he get here today?

MR. KESTNEBAUM: He was here today. I will have him here the first thing in the morning.

THE COURT: All right.

MR. SHANLEY: At this time I can explain some of the documents.

THE COURT: By all means.

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MR. SHANLEY: Thank you, your Honor.

Ladies and gentlemen, counsel for defendant has graciously - -

MR. KESTNEBAUM: Your Honor, may I interrupt for a moment? The defense rests.

THE COURT: Very good.

Explain the documents.

MR. SHANLEY: Counsel for defense permitted me to put these documents into evidence reflecting a series of bagel deliveries and graciously did not put the government to the task of proving the bagel transactions and so I will attempt to explain them to you, ladies and gentlemen. Of course, the exhibits are here for you to see.

There is one exhibit, Government's Exhibit 8,which has to do with business transactions, basically 2144. It is simply a certificate from the State of New York, Department of State, which indicates the 2144 Food Corporation was in fact a corporation in 1970. It is an official record of the Department of State.

Then we have a record of the Manufacturers Hanover Trust Company which is Government's

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Exhibit Number 45 which is simply a record they keep in the normal course of business which shows Mr. Benjamin Schwartzberg is authorized to sign checks for the Star of David Bagel Corporation and that is a record kept in the normal course of business of the bank.

Then, Government's Exhibits 1, 2, 3 and 4; a series of documents. Each one would reflect deliveries and sales, sales by Staple Trading Co. and deliveries to Bagel Stop-2144 Food Corporation of R.-Dex 550, which is a flour, as the witness testified, is a flour used in the making of bagels and there are four such deliveries from Lackawanna Warehouse in Jersey City dated February 14. This is the top date on the document. This is the date of the invoices; February 10, February 19, March 3 and July 10 and these reflect deliveries and sales of R-Dex 550.

Then we have Government's Exhibits 6, 7, 5 and 8 which are once again records kept in the normal course of business and these records were obtained from Mursk Brothers Inc. in Edgewater, New Jersey and they reflect deliveries of flour,

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pep flour to 2144 Food Corporation from a warehouse in Edgewater, New Jersey and it was delivered to 2144 and they were delivering it for Standard Milling Company in New York but they have a warehouse from where their shipments are made and I will give you,once again, the dates on top of the document; June 5 for Exhibit 7; June 22 for Exhibit 5; and there is another June 22 for Exhibit 6. The underlying documents will show that the deliveries were not on the same date although two invoices indicate that and the last one for July 8, 1970 which indicates deliveries and then on the other side of the coin, Exhibit Number 46 which is from the Standard Milling Corporation, their invoice reflecting these four different deliveries and sales, these invoices reflect the fact that it was delivered to the corporation and that they were paid for. That is Exhibit Number 46.

As I say, these are always here for your inspection, should you care to look at them.

Thank you, your Honor.

THE COURT: Anything further, gentlemen?

MR. KESTNEBAUM: Your Honor, I have

rested prematurely. I have a witness I would like to testify. He will be very brief and he is here.

THE COURT: All right.

T E D S C H W A R T Z B E R G , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. KESTNEBAUM:

Q Mr. Schwartzberg, what business are you in?

A I am in the bagel business.

Q With whom?

A Star of David.

Q Where are they at?

A 67-11 Main Street, Flushing, New York.

Q Is your father in that business with you? That is, your father, the defendant in the case?

A Yes.

Q You have a sister?

A Yes.

Q Is she in the business?

A No.

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Q She's raising a family?

A Correct.

Q And you are?

A Right.

Q You have how many children?

A I have two children.

Q And she has?

A Three children.

Q Do you remember July 16 of 1970 at or about midnight?

A Yes.

Q Were you working at that time?

A I started to work. I came into the bakery to work at about 1:00 o'clock.

Q That would be the next day, July 17, 1:00 A.M.?

A Correct.

Q Was your father there at that time?

A Yes.

Q Did he do anything then?

A Yes. Our driver was on vacation and I was working for our driver, delivering nights.

My father told me he would be late at the office. He was working there and I asked him if he would deliver

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some stops for me and I could come in later.

Q Where were the stops?

A The addresses?

Q Yes - - well, the names, if you recall.

A Clearview Bakery, Clearview Appetizer, Denise Pastry, Waldbaum No. 57, Francis Lewis Boulevard and one located at 154th Street and Ninth Avenue in Whitestone.

Q Were any of the stores in the area of 2144 Utopia Parkway?

A They all were.

Q How far away is Denise?

A I would say about two blocks away.

MR. KESTNEBAUM: That's all.

CROSS-EXAMINATION

BY MR. SHANLEY:

Q Mr. Schwartzberg, do you recall asking your father to deliver or make any deliveries for you in the weeks previous to that?

A That was the first week of the driver's vacation. He has always made deliveries for me when it is difficult for me.

Q Did you ask him to make a delivery for you on the night of July 8th of that year?

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A No, I don't believe so. I don't recall.

Q How about July 9?

A What day would that be?

Q I don't know the day.

A Well. it makes a difference. Some nights I don't work so I am not sure.

Q You just don't have a clear recollection?

A No.

Q What were the names of those stops again that you asked your father to deliver to?

A The Whitestone route?

Q Yes.

A Denise Pastry, Waldbaum No. 57, Clearview Appetizer, Willets Point Boulevard, Clearview Bakery and Waldbaum's at 154th Street and Ninth Avenue, also Whitestone.

Q Now, Mr. Schwartzber, I take it you are very fond of your father?

A Yes.

Q And you would testify in his behalf; is that correct?

A I would testify to the truth.

Q Well, that of course is what we are looking for here today.

MR. SHANLEY: Thank you.

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MR. KESTNEBAUM: Thank you.

THE COURT: Thank you.

I have a heavy calendar in the morning. I want to check that you don't have to come in unnecessarily.

You have heard all the evidence in the case but you have got to get the summations and charge before you begin to deliberate so keep an open mind and don't discuss the case with each other or anyone else.

I want you to come in at 11:00 o'clock. I will try to reach you shortly thereafter.

Good night and have a pleasant evening.

(Jury excused at 4:45 P.M.)

MR. KESTNEBAUM: May I make my motion for the record?

THE COURT: Yes, please.

MR. KESTNBAUM: It is to dismiss or in the alternative for a directed verdict of acquittal on the ground that there are no issues of law involved and/or a fact issue to be decided by the jury here.

THE COURT: Denied.

MR. KESTNEBAUM: Exception.

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MR. SHANLEY: I have one or two matters to bring up.

First, as to my motion I made on the bail revocation - -

THE COURT: I don't have enough here to revoke bail on the basis of what I have heard.

MR. SHANLEY: I would ask your Honor to direct the defendant to stay away from government witnesses.

THE COURT: Yes. I so direct the defendant. Do not go near government witnesses or make calls to them or members of their families.

MR. SHANLEY: Thank you, your Honor.

We were going to discuss the charge.

THE COURT: Yes. Do you have any suggestions?

MR. SHANLEY: Well, your Honor, on Page - - it is an unnumbered page but it is after Page 5 so it is Page 6 of your Honor's charge when you charge on interstate commerce I would respectfully request your Honor that it is an incorrect charge as a matter of law.

THE COURT: What do you think I ought to

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say?

MR. SHANLEY: Your proposed charge that they must find that the act of the defendant obstructed, delayed Interstate Commerce - - no adverse affect need be shown - - commerce adversely affected - - or by the reduction of the profits of the interstate business - - well, your Honor, in the Hobbs Act case, United States v. Augello, it is a combination; matter of law and fact and in Augello, 1971, your Honor, the 2nd Circuit charged or said that the correct charge in the Hobbs Act was as follows:

If you believe that - - in this case 2144 - - purchased goods in Interstate Commerce and 2144 was a victim of extortion and as a matter of law interstate law was affected.

In other words, it is not for the jury to decide whether there was an affect on Interstate Commerce. If they find extortion and they find they purchased goods, then, as a matter of law, commerce was adversely affected and the 2nd Circuit said it was a correct charge.

THE COURT: I had proposed to amend that

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charge which I thought was somewhat misleading by providing that Interstate Commerce does not need to be reduced. It is enough if it shifts from one purchaser to another. Thus, if a flour was going to 2144 and as a result of extortion it went to another bagel bakery in New York it would then be adversely affected.

MR. SHANLEY: I still disagree and adversity is not in the Hobbs Act.

We are talking civil rights. This is not the commerce involved in the Hobbs Act and I have the Augello opinion, your Honor, and I would respectfully ask you to reconsider.

THE COURT: Let me see it.

(Document handed to court.)

(Pause.)

MR. SHANLEY: I think it is on the bottom of the page but I forget which page number.

MR. KESTNEBAUM: Your Honor, I believe they said there they wouldn't reverse on that charge as I recall.

THE COURT: They went further and said this is a question for the jury.

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Well, what is the defendant's view? It is really not the issue in the case.

I think you are right. That is what the 2nd Circuit has said but I am not certain that is what the Supreme Court would say under these circumstances of this kind of case.

It does distinguish in a way a Supreme Court case. That is why I was going to add that "You must then finally find the acts of the defendant affected such commerce."

Milling was a New Jersey corporation, wasn't it?

MR. KESTNEBAUM: The flour came from New Jersey; Jersey City.

THE COURT: What was the name of the company?

MR. SHANLEY: Standard Milling. They have a warehouse in Jersey.

MR. KESTNEBAUM: Their office is in the Empire State Building but their warehouse is in New Jersey.

MR. SHANLEY: Then there was Staple Trading Company, your Honor.

THE COURT: Well, Standard Milling.

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Here is the way I plan to treat this problem. The charge on this point will begin: You must finally find the acts of the defendant affected such commerce. No major disruption or obstruction or adverse affect need be shown. Interstate Commerce does not need to be reduced. It is enough if it shifted from one supplier to another or purchaser to another. Thus, if flour from New Jersey was going to 2144 and as a result of extortion it went to another bagel bakery in New York then it would be adversely affected.

MR. SHANLEY: Your Honor - -

THE COURT: Excuse me.

It does not seem to me there is a serious question about the fact that 2144's closing reduced interstate shipments, shipments from Standard Milling in New Jersey to 2144 in New York.

The critical issue is whether the defendant's acts, or the fear of him, beyond a reasonable doubt caused the closing.

Satisfactory to the defendant?

MR. KESTNEBAUM: Yes, satisfactory.

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THE COURT: I think it takes it out of the jury's hands as a practical matter.

MR. SHANLEY: As a practical matter but I would like to note my exception.

They should be charged they don't have the right to make that decision. This is the court's decision to make and if they just find there was commerce that is all they have to do. They should not be charged to inquire any further.

I try to take direction from the 2nd Circuit.

THE COURT: I try to take direction from the 2nd Circuit but I try to try the case so we don't have unnecessary reversals.

MR. SHANLEY: Did you check the charge Judge Zavatt gave?

THE COURT: No, I did not.

I am not sure the opinion reflects his whole charge.

Judge Zavatt was very careful and he would have said more than this opinion reflects. You had better be very careful about that. I think it is too dangerous to go further and there

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is no need for it.

MR.SHANLEY: All right.

I do have one or two other - - I would like, your Honor, if you could, to put in some language as to the reputation of the defendant as to instilling fear. It goes to the state of mind.

THE COURT: I have charged half a dozen times on that.

MR. KESTNEBAUM: At least six times.

THE COURT: If they don't have that idea in their heads now, then - -

MR. SHANLEY: Request Number 11 on Page 9 of your charge as to witnesses' testimony. Perhaps a little more elaboration as I submitted in Request Number 11. I feel it is a little black and white so to speak.

THE COURT: Let me see yours.

(Document handed to court.)

(Pause.)

THE COURT: Yes. I will say that or something like that. All right. I will put in a request for eleven. I normally say something a little less wordy but I will put that in.

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We have the request. We will just bar this to make sure we have it.

MR. SHANLEY: You may keep that copy.

THE COURT: Anything further?

MR. KESTNEBAUM: Nothing.

MR. SHANLEY: Nothing.

THE COURT: Thank you for your help.

MR. SHANLEY: 11:00 o'clock tomorrow morning?

THE COURT: Yes. I will try to start as soon as I can but I have a heavy calendar. Good afternoon.

* * *

Brooklyn, N. Y., September 21, 1973.

(The trial was continued. The jury is not present.)

THE COURT: Do we have any additional witnesses?

MR. KESTNBAUM: We both rested, your Honor, and we are ready to sum up.

THE COURT: Is that correct?

MR. SHANLEY: Yes, your Honor.

THE COURT: All right.

Bring in the jury, please.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. Nice to see you all on time again. Since we have had such a healthy and prompt jury, I don't think there's any need for Alternates 3 and 4 to remain here during the argument unless you would like to do so.

Would you like to do so? Would you like to remain? Because you will probably be relieved.

All right. Then we will commence with the argument. We will hear from the defendant first and then from the Government.

The defendant will not have an opportunity to be heard after the Government speaks.

Remember, what the attorneys say is not evidence. You have heard all of the evidence in the case. But the attorneys are asking you to draw inferences from that evidence. If an attorney should say "I believe" or "I know," you recognize that it's not because he knows any more than you do. You are the only ones that know anything about the case now because you only decide it on the evidence before you, so they are speaking hypothetically to you.

Proceed, please.

MR. KESTNBAUM: Thank you.

(Mr. Kestnbaum summed up to the jury in behalf of the defendant as follows:)

MR. KESTNBAUM: May it please the Court, Mr. Shanley, Mr. Foreman, ladies and gentlemen of the jury:

It now becomes both my privilege and my duty to sum up in this case on behalf of the defendant, Benjamin Schwartzberg, bringing into the details of the case. I want to thank

all of you for your attentiveness during the trial, which has been apparent to every one, and I want you to know that I appreciate it and the defendant appreciates it.

And I also want to acknowlege the fact that we're all very fortunate that we have had presiding in this trial --

THE COURT: No, no, please.

MR. KESTNBAUM: All right. I wanted to thank the Court for all its attention, in any event.

Now, as you have been reminded, what I say, what Mr. Shanley says, is not evidence in the case.

The Court is the law department and is supreme on the law. You are the fact department. You are supreme on the facts. Your determination is conclusive on the facts. There can be no quarrel with it.

The Government cannot win or lose a case. The Government has no right to seek more than justice, and if justice is done, it has no complaint or no quarrel.

Now, a trial is a quest for the truth.

There is certain ground rules you start with. There's this invisible armour, a presumption of innocence, one of the strongest presumptions known to the law that fortifies the defendant. That's our system of justice. A man doesn't have to prove that he's innocent.

As is the case elsewhere, he's protected with that presumption which remains with him unless the Government were to prove guilt beyond a reasonable doubt and, if it doesn't establish that, then of necessity, your verdict must be one of acquittal.

And, of course, the words "reasonable doubt" will be defined to you by the Court. Quite obviously a reasonable doubt means just what the words imply: as prudent people, would you hesitate to accept what has been handed to you by the prosecution in this case?

Now, let me examine with you some of the evidence. Let me remind you that it is your recollection, not mine, that prevails; but summing up first, Mr. Shanley following me, without me being permitted to answer him.

As you know, I would be very foolish as a lawyer if I were morally dishonest and try to fool you by throwing dust into your eyes or raising a smoke screen. Smoke screen is a particular characterization of a frustrated prosecuter, and there aren't going to be any on the part of the defense in this case.

One of the most important prosecution witnesses, the first prosecution witness, was Patricia Guze. That's the young lady who said she had a fight with her parents on July 16, 1970, and even though she didn't work at the 21-44 Corporation. She sought permission to sleep there. She was about seventeen years old at the time and this was quite an impressionable matter and, in fact, I venture to say that the facts of July 16, 1970 would be indelibly planted in her mind.

Nevertheless, she told you that she couldn't remember the reason for the fight. She left her home and sought permission, she said, to sleep over at 21-44.

Well, maybe she didn't have any friend

she could stay with. She was sleeping overnight in a food shop locked in. If you want to believe that. But I don't think you will when we're through considering her.

Now, it's dark outside, the early hours of the morning, and she saw a man, of all things, in white. The most conspicuous color that stands out like a sore thumb, in a grey Cadillac. Another sore thumb. Making every sign and move under the sun that would make you take notice of him. He'd be turning about, he'd been twisting about, acting extremely suspiciously. She said.

And then she saw him go by and she'd be speaking to her friend, Diane, who saw him go by, and then he finally ignited something in the area of the gas tank, which she first said was nearest to her on the right side and later corrected herself when confronted with her Grand Jury minutes that it was on the left side of the truck.

And then she said she phoned the police. The truck was ignited. And she went to the back and waited, and the police came

and signalled her, rapped on the door, and she came and said to the police, to Officer Ward, "They have set fire to the truck. There it is burning." And he put out the fire. And she also said to him, "There he is. He's going by again." And Officer Ward followed and apprehended the defendant.

Well, Officer Ward has said to you that isn't so. And, incidentally, when you try to solve a situation like this, it's like a jig-saw puzzle. You have to bear all of these factors in mind and if pieces don't fit, you'll soon discover why don't they.

Officer Ward said, "She told me that she was employed by 21-44." She said she was not employed. She said she didn't remember why she had the argument with her folks, and these things have great significance.

And she said that she told Officer Ward, "The truck is on flames," and he put it out and he said, "No, I had been alerted by the radio call that there was a truck on fire. I drove around and saw it and it wasn't on fire, and when I parked behind it, I saw a

flame coming out. That was at least twenty minutes after the radio call."

Now, why would Patricia give you this sort of a story? Officer Ward, a patrolman, had no axe to grind. He was not an employee of anybody. Completely honest, as I think most policemen are, and he gives you an entirely contradictory story from beginning to end. There's a reason for that.

You remember that when we were talking about Philip Reicher and I was asking her about why she didn't sleep here or there or the possibility of it in his studio apartment, not the apartment or home where he lived with his wife and three children. But his studio apartment on Woodhaven Boulevard, and Fleet Court came up.

And I asked her about that and she inadvertently blurted out, "I was never there overnight." I didn't ask her that, and then she said she had been there on two occasions for only about a half hour.

And I would suggest to you that

Philip Reicher got together with her in the meantime because his testimony corresponded exactly. He said she was only there twice and only for a half hour each time.

Well, I suppose for what they must have been doing, a half hour was adequate time, and I would also suggest that you don't watch a clock at all times during all of your activities.

But why do I, why would Patricia Guze give you a different story than Officer Ward, who made a record of it? Why would she say to the officer that she was employed there; that she was there for security reasons, to detect vandalism?

She said that because she wasn't prepared that night. But that's such a stupid reason. That's so ridiculous. To think for a moment you would take a seventeen-year old girl and put her in a locked-up store to apprehend vandels or criminals or anything else.

She gave you a different reason. That's why she had had a fight with her parents about

something she didn't know anything about, and that's why she was there.

And she said she was at the front of the store and saw the defendant go by in his car. I would say that's a proper statement. He had four deliveries in that area. Denise Bakeries you will recall was within two blocks of the area, and you will also recall Teddy, the son of the defendant, said that about 1 o'clock that morning he had Tom, Pop, Lou drop these off, these orders off at those four bakeries, which he had.

Now, Patricia, I would suggest, did see the defendant go by, but she wasn't alone in that store, and what I'm about to show you will establish that quite conclusively. She had someone with her. That someone must have been Philip Reicher. You have her story about a telephone conversation with him. And you have a couple of members in a group talk about telephone conversations, where they originated and wound up we don't know. Why do I say Philip Reicher was in that store? Philip Reicher undoubtedly had a date with her

at about 1 a.m.

And she said to her friend, "Diane, call me at 1 a.m. So if I'm not up then, I want to be up." And why would Philip Reicher meet her there, when he had a studio apartment on Woodhaven Boulevard? Why not meet her there? Well, there are two reasons for that:

Number one, if his wife was suspicious and called, he'd say "I was at the place of business" and he would be there, wouldn't he, to answer the telephone?

THE COURT: Excuse me, counselor, I'm sorry.

MR. SHANLEY: There's no evidence at all in the testimony of this last few statements that Mr. Kestnbaum has been making.

THE COURT: Well, we understand that, but what counsel is doing is asking the jury to draw inferences from the evidence that was adduced before them, and that kind of argument by both sides is permissible.

You may continue.

MR. KESTNBAUM: Thank you.

Now, knowing Philip Reicher as you do

and having observed him, isn't it quite within the realm of possibility also that he may have had someone else stay at his Woodhaven Boulevard Fleet Court apartment? What did he have it for? Maybe he had another female friend there. He's that sort of a guy. Is that a fair estimate of him, having seen him and observed him?

Now, let me show you why there is plenty of evidence that he was there. He and Patricia Guze see the defendant go by, and he's discernible readily in a white baker's uniform in a grey Cadillac. No one but an idiot, a complete idiot would try to do anything at night that was wrong, dressed that way and driving that way, and I don't think the defendant is a complete idiot.

So then he was in the neighborhood making deliveries, and Patricia Guze calls the police and said a car is on fire, the truck is on fire.

How long could the truck be on fire? Paper was found in the tank, originating in the neck of the gasoline tank. A minute,

two minutes? That's what the fire marshal told you. Bear in mind also now that when Patrolman Ward came up, he didn't see a fire. The fire ignited when he got to the back of the truck. Could that fire have been burning for more than twenty minutes? Isn't that ridiculous and impossible? Doesn't that violate the law of physics? Wasn't that fire set by somebody within a minute or two of the time the police car drew up and didn't Philip Reicher get back into the store just in time or he would have been protected?

He's got a sort of a mind, you know, and if it wasn't that way, for heaven's sake, why did Patricia Guze lie to Officer Ward about everything? Why did she forget that she had an argument with her folks, that she was not employed?

She said flames spread out, spit out, and you finally heard that the ultimate damage to that truck was $70, and the fire which Philip Reicher, the arsonist set, didn't have time to ignite, and the police were able to put it out in no time at all and then the fireman

came along and put more water into the tank, and you've heard the fire marshal say, and if he doesn't know, who would?

When I asked him how long that fire would consume if it didn't hit the gasoline tank in a minute or two.

Now, sure they knew the defendant was in the neighborhood and then he was making deliveries and along came a police car, undoubtedly with sirens ringing and a fire truck.

Defendant was on his way home after the deliveries. Wouldn't you -- without being a competitor, if you see this truck and this car draw up to your competitor's place, wouldn't you drive by and look? That's all he did.

Now, Patricia Guze said, "There he is. He's going by again," to Patrolman Ward. Officer Ward says"that's not so, that isn't true, I got back in my radio car, I signalled headquarters that I was back on patrol and then I observed the car and I went after it. He was going at a moderate rate of speed and I stopped him, and he told me he was on his way home,"

a statement completely consistent with the facts.

And Patrolman Ward said, "Yes, deliveries are made at that hour and that there are these stops."

And Steinberg said, "Yes, I used to work for Mr. Schwartzberg. He did have these stops." And his son said, "Pop, would you do me a favor and make these deliveries for me."

So he was in that area, no question about it, and he was attracted by the police car and by the fire engine.

Now, if Philip had succeeded in this plan and he was desperate, he was the one that was desperate. He couldn't even make good a $62 check. He was in such desperate circumstances he couldn't pay his employees. He was in such terrible shape that he was haled into the Criminal Court for issuing no good checks. It's a form of larceny under New York law, you all know that.

So we have Philip the larcenist. And he got C.O.D. goods on no good checks. Philip the swindler. And he had this little haven on

on Woodhaven Boulevard and he apparently carried on affairs in his own bakery. Philip the adulterer and Philip the philanderer.

Now, let me talk a little more about Philip. You know, that I don't challenge the legality of what was done, but he was undercutting all the people who worked hard in the industry. And all you've heard about the defendant Schwartzberg, except for this, hearsay, which I will dispel for you in a moment or two.

Defendant was a hard working man to people who knew him and did business with him. Even the prosecution witnesses told you he was a hard working decent man who earned his living by blood, sweat and tears, who built up his business, but he paid his bills. He was fair and square in the conduct of his business.

Can you say that about Philip Reicher? Can you say that about 21-44? Who's crooked and who is robbing in this enterprise? Who would do anything like that? "Ben the bomber," "vicious," and all that. Who told you that?

Did they produce a single creditable witness who you could believe who said that he was known as that outside that place? I tried to find some.

These people told you, 21-44 people said, we were told that. Where were the people who told them that? Why didn't the Government produce them?

You know, the Government has a lot more artillery than I have. I'm a single practitioner and I represent a hard-working man who's trying to make a living in the bakery business. The Government has more resources than I have.

Why didn't they produce the people. Indeed, why is it? You heard so much about the state of mind of these partners. Why is it that the Government produced them, among five partners, no one but Philip Reicher?

THE COURT: Excuse me, counsel has rised.

MR. SHANLEY: Well, your Honor, I -- excuse me.

THE COURT: All right.

MR. KESTNBAUM: Government produced, of

the five partners, only Philip Reicher, and I stand by that statement. You know it's so. Where was the father-in-law? I produced Levy. Steinberg wasn't produced. There was another partner who wasn't produced. But, through the back door, they tell you they were all worried and troubled.

Yes, they were worried and troubled, they didn't pay their employees. They couldn't make good checks of $60. They couldn't draw any money out of the business. They were in deep trouble and very, very desperate.

I'm surprised they didn't set fire to the inside of the place, maybe they didn't have enough fire insurance. I don't know.

But they were the ones, gentlemen, who stuck the milling company. They were the ones who went to their account and borrowed $3,000 at a time. They were the ones who kept the defendant waiting for three weeks to collect a $62 check.

And he had to go over to their place of business on July 10 to do it. Now, sure, he must have been sore. I think he might have

said, "You people have a heck of a nerve doing that to me, you ought to watch yourselves," and I would do the same thing and wouldn't you, on a check like that for merchandise? If you weren't paid, if you were cheated and defrauded by Mr. Philip Reicher and company. Isn't that a normal reaction of an honest business man to a situation like that?

I suppose a dozen creditors told them, "This is is your last grasp." It was a going business. They told you everything was fine. It was going very, very fast.

One of their partners took the stand here, Levy. He had $9,000 of his money in the business. And he told you about it. He said he knew his money was gone. He wasn't drawing anything. He was in the habit of eating regularly and he went back to his electrical work and he said that the defendant was not known that way, except that he heard that around 21-44. That's Mr. Philip Reicher and company.

Now, one particularly annoying, appalling thing about this case is that Mr. Reicher, of

all people, assumed the mantel of innocence and holiness, why he said on the witness stand when he didn't think I could rebut it? "I paid Standard Milling all their money. Sure, we closed owing them $5,102.30, but I paid them back, maybe there's a hundred or two hundred owing on that. When I signed a check, there was money to cover what my partners did."

I don't know, but then we produced the vice-president of the Standard Milling Company, if you recall, and he said "That's a lie. That's perjury." Philip the perjurer. "I never got back a nickel of that five thousand dollars. He gave me -- when I put him on a C.O.D. basis, he gave me checks that bounced." That's taking money by false pretenses.

So, you have Philip the crook, too, and "I had to take him into the Criminal Court and then he paid me in installments."

So you have Patricia Guze lying from beginning to end. You have Philip lying, and I think the Judge will charge you, if I'm not very much mistaken, that when you have witnesses lying on all these material facts that they

have, it is your privilege to reject their entire testimony, particularly when you have the wrong defendant before the court.

The defendant in this case should be Philip Reicher. Perjurer, the raider. Philip the bomber, yes, with relation to the truck. The philanderer. The adulterer. He signed no good checks. He was a swindler. He got money under false pretenses by issuing checks without funds to cover. He didn't pay his employees, did he? And there was government action to get them what was due to them for their hard labor.

What have you actually heard about this defendant is bad. Philip worked for him and Eugene Steinberg worked for him. "Yes, he was hard working and he ran a decent business and all that, but we didn't think he paid us all we were entitled to."

That's the only subjective knowledgeable complaint you have against him, having observed him. I don't know what he paid them. I do have the impression whatever he paid them was too much for their work.

Now, how about that apartment on Woodhaven

Boulevard and Fleet Court? Remember, I asked Patricia Guze about that, why she didn't sleep there. "Well, I was only there twice. That was his apartment. And I was never there overnight." 1970 we're talking about.

He said Patricia Guze had that apartment until '72. Didn't he say that? If you recall, it was in her name, and what did he do? He took it over in the name of a corporation. And the corporation paid the rent.

So you have Philip the tax cheat, too, don't you? You heard a lot of phony talk that no bialy corporation would sell them bialys. Of course not. They weren't paying their bills,number one. Even when you put him on a C.O.D., they give you a phony check and you'd have to take them into court to get your money.

They were a bunch of crooks. Number two, they were raiders. If you were in the business, would you aid or abet them in the promotion of their crooked enterprise? Would you sell them anything? They take your accounts away.

Now, Philip would have had you believe that the defendant was throwing some sort of

a curve that when he sold them bialys, they had different shapes, weights, sizes, and he was throwing a monkey wrench into the machinery.

Well, the trouble with lying like that is that usually you're nailed down. You can't get away with those things. That's why big things come out of little things. Government, Watergate, wherever you want it.

Let me read to you what Philip Reicher told the Grand Jury back in 1970 about the bialys:

"Right after I took five Waldbaums from Benny, we severed our relation and I started doing business with his nephew, Marty, and I started taking bialys from my wholesale right from Marty for my Waldbaums, and I told him."

So when he severed relations, he had taken five Waldbaum stops. That's why he didn't buy more bialys from the defendant. Why did he have to lieabout a simple thing like that?

Now, they called in an officer of Waldbaum's Supermarket. It's a big outfit. Mr. Pitt. And he was an eminently respectable

witness, too. The prosecution called him. He had no ax to grind.

What did he say about the development? Let's get some evidence outside of this 21-44 family about the defendant. He told you that in his twenty years of doing business with the defendant, the defendant was always fair, honorable and decent and he never heard a bad word about him. And he's a knowledgeable individual. He's an important officer of an important company in the industry.

Doesn't that fortify my argument that except for 21-44, where are the individuals who heard that? Or did this all originate in 21-44?

That may be window dressing. Bad reputation. We were frightened, and so on and so forth, because the pivotal issue in this matter is the truck, because we know that.

Now, why did Philip Reicher go out of business? Let's take what Mr. Pitt, a Government witness, who you will agree and I think Mr. Shanley will have to agree, is completely honest, completely reliable.

He took five stores away from the defendant

and gave them to Reicher. He had no ax to grind anywhere. He's a business man. And he was asked before the Grand Jury back in September, 1970, "did you have a conversation with Mr. Reicher or anyone else at 21-44 Food Corp. concerning their termination of business?"

Hear his answer, after speaking to Philip Reicher. "Answer: No. He called me one day in advance and he couldn't get in touch with me that day and I found I had no service. He tried getting in touch with me. He said, he would, if I recall correctly, he tried to re-organize. He had financial difficulties. He tried to reorganize this company and he said if it would work out, he will serve me and if it's not going to work out, he will not serve me."

That's what Philip Reicher told Mr. Pitt who bought the bagels for Waldbaums Supermarket and was an officer of the company. When he was offguard and wasn't lying.

Well, there's so much evidence in this case, ladies and gentlemen, Mr. Foreman and ladies and gentlemen, of the reason that they

went out of business that I won't bore you by going over it all again.

You know, as I pointed out, they couldn't pay $60 checks. They couldn't meet payroll. They couldn't meet C.O.D. checks. They were swindling to get merchandise. That's why they went out of business, and the bombing of the truck, boy, Philip Reicher, in the early morning hours of July 17th was an act of desperation. And he's got a cunning mind. You know, it takes a lot of nerve for a man to do some of the things he's done. But he's a nervy man and a cunning man.

A married man with three children to set up a studio apartment situated on Woodhaven Boulevard and Fleet Court. That takes a lot of nerve. Even for a character like him. A man to get up on the stand and lie to you and say I paid these people off. I never signed a check that was no good. The others may have done it. I don't know about it.

When I bring reputable witnesses that say that's a lie, he never did it. It takes a lot of nerve to perjure himself the way he did.

He's exactly the sort of man in this act of desperation who would be there. Sure he was there. His girlfriend was there, wasn't he? He saw the defendant going by making deliveries and he thought he would kill two birds with one stone. If he could get by the defendant, get the defendant involved, that would be a masterpiece and maybe collect a lot of insurance on his truck. That I don't know, but it's a fair inference.

I don't think it's necessary to refer any more to the fire marshal's testimony. He followed Philip Reicher, as I recall. But you remember. Paper fire like that would take one or two minutes. Police took twenty minutes to get there and the fire came out afterward. That I think is almost conclusive evidence that someone who was with this young lady set that fire. It originated at about the time the police came, otherwise all the laws of science and all the expert testimony doesn't mean a thing if you disregard that.

But if you do, adjudge the facts in the light of your God-given common sense and,

certainly, when you were elected to serve here, you didn't agree to leave that behind you, the resolution of the facts is not very difficult.

Now, I don't want to spend much time on the other prosecution witnesses. One of them told you, Stephan Sterman, that the defendant asked him to join the union. So what? Defendant was a member of Local 802, I think it was. What's wrong with that? That's not cheating anyone. That's not issuing a bad check. That's not committing adultery. That's not bombing a truck. That's not fooling your wife and children. So what? There's nothing wrong in that. Defendant was unionized. Why not 21-44? It's not stealing the business of everybody else in the market site.

He also talked about they saw a window broken and he gave a description of the one who did it.

You heard Mr. Levy say that there were broken windows all over the neighborhood. Well, you know that all over New York it's terrible. You may remember up at 46th Street

and Fifth Avenue, I think it was half a block front, the Wallach Stores, all vandalism, broken windows. Walk into any elevator building, vandalism. Walk into any subway car and it's getting to be loathsome. It's all over New York. They forgot to accuse this defendant of assasinating McKinley and Lincoln and causing the two World Wars and being responsible for Watergate. They might as well said they heard that from persons who were not produced here. If you try to swallow that sort of stuff, it will be indigestible.

Now, Darryl Steinberg, the son of one of the partners, who talked about the defendant, he was known as being a violent man, a vicious man, Benny the Bomber, the Mad Bomber, and so on and so forth. But who told him that? Where was the party who told him that? Why didn't the Government produce him?

The full power of the United States Government with more than three years to exercise all of its powers, comes forth with this sort of evidence, without producing a single credible witness who can say, yes, I told them.

You didn't hear that on the witness stand.

MR. SHANLEY: Your Honor, this particular part of the summation, your Honor, there's a remark, accusation being made against the Government. Counsel knows full well some of the reasons why we can't produce these witnesses.

THE COURT: Which witnesses?

MR. KESTNBAUM: The people who were supposed to have said he's vicious and so on, and I say I don't know very well why they weren't produced.

THE COURT: The absence of witnesses may be commented upon.

MR. KESTNBAUM: I don't know why they weren't produced and why the full power of this government wasn't used to bring them here. Why that strikes me, I'm not accusing Mr. Shanley, he's a decent person. But this strikes me like putting a one-armed man in the ring with Forman, the heavy weight champion of the world and tying that arm behind him and blind folding him and saying you fight Forman, the heavy weight champion, and I say it isn't fair, and there's

a similarity here. I'd like to have heard something from anyone but that group of criminals up at 21-44 and I think you would, too. And that had nothing to do with Mr. Shanley, who got into this case long after it was prepared.

I'm reflecting on him in no way. He's a decent person, as far as I'm concerned. Now, you heard Mr. Levy tell you that there's a guy who lost his time. He lost his time and his money, his $9,000. He said that he had heard the defendant spoken of as a decent, hard - working man. He had heard at 21-44, from Philip Reicher and company that he was known as this, that and so on. There was some brain washing for some period and then you heard the machinery man I produced as an expert, Mr. Brawney Gadman. Brawney was the man with the rather long hair, who also told you that he knew the defendant. In fact, he visited him in the home in 1971, and I think at a later date when the defendant had one of his heart attacks and he was the expert on machinery. He's been in the industry for

many, many years. He got along all right with the defendant. He had his bills paid. He was treated fairly. But he wouldn't do business with Mr. Philip Reicher and company and in his expert judgment, they were foredoomed to fail and they couldn't get off the ground. That's what he told you.

Then you heard Mr. Schumach of Standard Milling tell you that he was taken by Mr. Philip Reicher. Nobody told you that the defendant took them. Of course, these people were here yelling, these frustrated people who wanted to knock the defendant out of the box and failed and thought they would take over; that Mr. Philip Reicher is lying to you, he never paid his bill. And then you heard the testimony of Reicher being forced to pay by court order under the threat of jail and then you heard Teddy say at 1 o'clock in the morning when his father was through and wanted to go home, he told him to make these deliveries in the area where he was, undoubtedly spotted by Patricia and Philip and he did what any normal person would do. Hearing the sirens, hearing the fire

truck. He went to see as he was on his way home.

Now, I think the facts are apparent. Whether or not I would have a defendant testify is a judgment of counsel. But would I dignify this case, would I take a man with heart attacks and put him on the stand to repeat what you've heard, that he was there to make to cater to his customers as you have heard? The reason it's completely unnecessary to do that is that all you have to do is to think of the physical facts, the testimony of the fire marshal, and you have a very, very good idea of what this is all about and what Mr. Philip Reicher is capable of.

I don't have to prove that this was done by anybody. I could have sat silent through the whole trial. I didn't have to cross-examine anybody. I could have even waived my summation, and the Government still would have to prove guilt beyond a reasonable doubt.

I think if there's one thing that is clear in this case, it is that you are dealing with a desperate criminal known as Philip Reicher,

who will commit and has committed most of the crimes of the books on Penal Code of the State of New York and maybe the Federal law.

Now, you folks are called upon to perform the most important duty you have ever had. As the Court has told you, this is a serious case. And the liberty, if not the life, of this man is, this hard-working, decent man, loving father, good husband, loving grandfather.

I do feel nervous to this that perhaps I've overlooked something or because of my shortcomings or limited talent the defendant may be in danger. I hope that isn't so, because he has committed himself to my humble hands for better or for worse. But I feel that, ladies and gentlemen, if I haven't been adequate, that you exercise in your intelligence for yourself, think the matter out as people of common sense and supplementary shortcomings so that justice is done.

When I sit down, I cannot answer Mr. Shanley, who is a capable and persuasive advocate. You know that. You know I may have

an answer to anything he may say. He may raise the usual prosecution, have a smoke screen. But you know I've spoken about the facts. I ask you to do my thinking for me, at that time. I can't answer him. I want you to judge this case only on the merits. Don't feel sorry for the defendant because of any illness because of his family status. But give him a fair deal because he's entitled to it. I ask you to find him not guilty. Thank you.

THE COURT: Mr. Shanley. It's twenty -- thank you, Mr. Kestnbaum.

It's twenty to one. We can start now with your summation, but we have to break at one, or we can let the jury go.

MR. SHANLEY: I would prefer not to have it interrupted, your Honor.

THE COURT: Very good. We'll be back then if you please at 2 o'clock, ladies and gentlemen. Enjoy your lunch. Don't discuss the case. Keep an open mind.

(Whereupon, at this time, the jury withdrew from the courtroom.)

THE COURT: Any objection to relieving

the third and fourth alternates?

MR. SHANLEY: No objection.

THE COURT: The third and fourth alternates may leave, only the third and fourth.

All right, gentlemen. Thank you.

(Whereupon, a luncheon recess was taken until 2 o'clock p.m.)

AFTERNOON SESSION

THE COURT: All right, bring in the jury, please.

(The jury enters the courtroom, and the trial was continued.)

THE COURT: Proceed.

(Mr. Shanley summed up to the jury in behalf of the Government as follows:)

MR. SHANLEY: Your Honor, Mr. Kestnbaum, Mr. Foreman, ladies and gentlemen of the jury:

During the course of summation of Mr. Kestnbaum, I wondered from time to time whether we were in Family Court or whether we were in the United States District Court of the Eastern District of New York, because the man that's on trial here today is Benjamin Schwartzberg and he's on trial for extortion, extortion of

Waldbaum accounts. The man who is not on trial here today is Philip Reicher.

The whole case, the defendant would have you believe, is against Philip Reicher and his Machiavellian-like influence over all his young friends. He has built a tissue of half truths and absurd and incredible inferences. That's not the way it was. That's not the way it happened, and in the next few minutes, I hope to be able to show you what did happen.

"Philip the swindler, Philip the adulterer, Philip the raider, Philip the perjurer, Philip the swindler," a sixty-two dollar check, ladies and gentlemen. It bounced. He admitted it bounced. But he said "I didn't do that deliberately. Sure, I signed it. This happens every day of the year in a corporate, business organization." Insufficient funds, a check bounces. He paid it back.

"Philip the swindler," he owes Standard Milling five thousand dollars. He testified that he owed a lot of money, that the corporation owed money and he testified that they were trying to pay it back. He testified he had.

paid back a lot and he was still paying him back.

In fact, Standard Milling, you remember that gentleman, that vice-president who took the stand, that Standard Milling Company is still doing business with Phil Reicher Company, Bagel Stop. "Philip the swindler."

Ladies and gentlemen, this business goes on, so you owe some money once in a while, you pay it back. This is normal business. Nothing unusual. He wasn't trying to gyp anybody. He was a hard-working young man who was trying to make a go of it in a very competitive industry.

"Philip the raider." What's wrong with going out and trying to get accounts? Isn't this competition? Don't you go out and try to get somebody's business? Give that person a better product and you get the business. This is free competition, ladies and gentlemen. That's the way it should be and that's the way he operated. He went out on the street and solicited accounts and he got some. What's so wrong with that? That's the way it's

supposed to be. "Philip the perjurer." Perhaps your recollection is different from mine, ladies and gentlemen. But I didn't hear him perjure himself. Perhaps he got a little confused on cross-examination, lengthy and very good cross-examination. He didn't perjure himself. He sat there and he answered the questions as best he could. He let it all come out. He told it the way it was.

And then "Philip the philanderer." And I might add perhaps he should also be called an exhibitionist because if he had done the things that the defendant asked you to believe that he was doing, he would have been doing them right next to the plate glass window that night in 21-44 Food Corporation.

Now, ladies and gentlemen, this was not a smoke screen. This was not a smoke screen that was put up that was referred to you by counsel before. This was a smear. This was an attempt to smear a young, hard-working man and all his young friends who were with him in that business. This was a smear. Pat Guze, seventeen years old when

this event occurred.

Now, I'm going to nursing school. Little Diane Regan, seventeen years old, now going to college. Phil Reicher, then about twenty-eight, the ring leader of all these people. Darryl, now twenty-two, Darryl Steinberg, and Ricky Fisher, about twenty-three years old, now having worked his way through college.

These are the people that are being smeared that are attempted to be smeared, branded as liars.

You observed their demeanor on the stand during the last week. Were they liars, ladies and gentlemen, or did they come forward as truthful, credible witnesses?

Sure they had discrepancies. This is normal human reaction. You don't remember everything perfectly. There are discrepancies between their testimony. If there weren't discrepancies, then perhaps you would begin to wonder the store is too pat.

For instance, Pattie Guze and Patrolman Ward. Pattie Guze says Patrolman Ward knocked at the window and she pointed the

fire out.

Patrolman Ward said he put the fire out and then knocked at the window. This is human recollection. Three years ago. Perfectly normal, credible. The point is there was a fire and that's the important thing.

Defendant would have you believe and would attempt to obfuscate the fact that he threatened Phil Reicher. His son threatened Darryl. He punched holes in Darryl's car. He broke windows and eventually he put the torch to the truck, 21-44 Food Corporation.

MR. KESTNBAUM: Your Honor, I object to these statements about holes in the car or breaking windows. There has not been the slightest evidence of any of that in the case.

THE COURT: Well, ladies and gentlemen, the attorney is asking you to draw inferences from the evidence. I believe, in view of the inferences that defense counsel requested the jury to draw, I believe that counsel for the Government is properly arguing in asking that contrary inferences be drawn.

MR. SHANLEY: Lastly, ladies and gentlemen, he put the torch to the equivalent of ninety sticks of dynamite, ladies and gentlemen.

THE COURT: Well, I don't believe that was the testimony.

MR. SHANLEY: Equivalent, your Honor.

MR. KESTNBAUM: It's hard for me to hear, but I think the counsel said ninety-six. Ninety instead of nine?

MR. SHANLEY: Ninety. Ten gallons of gas equals ninety sticks of dynamite.

Now, let's look at the bombing that night, or the attempted bombing. What you had told to you earlier was the solving of a perfect crime.

Defendant would have you believe that Mr. Reicher not only had the gift of prophecy in being there on that particular night when Mr. Schwartzberg was there. But, in the alternative, you would have to believe that he was like going down there every night and waiting for Mr. Schwartzberg to go by.

And you recall from the testimony of

Ted Schwartzberg that on that particular night, his father was doing him a favor by making those deliveries.

So you'd have to assume, therefore, ladies and gentlemen, that Phil Reicher had that gift which enabled him to know this man was going to be there, if you believe the defendant. And he also was able to instantly organize a crime against a man who he had just taken business from. It makes no sense, ladies and gentlemen.

It doesn't make any sense. What's he going to get out of it. What's he going to get, money?

And do you think and would you think that Phil Reicher would ignite a bomb with Pat Guzw in that store?

Ladies and gentlemen, but for the grace of God, Pat Guze was here to testify. You suppose what would have happened if that had gone off.

Yet counsel, defendant, would have you believe Phil Reicher organized that and did it. Incredible.

Now, let's look at just what did happen that night. Pattie Guze, seventeen years old, going to nursing school now. Then formerly employed or employed, testimony is a little confusing. She had an argument with her parents. She went down to the store to stay. There was a cot in the back. Perfectly normal. Seventeen-year old girls have lots of arguments with their parents.

She asked Darryl if she could stay.

Darryl said, "I have to call Phil. Call Phil." Phil said, "Fine." Pattie stayed. You have Darryl testifying to that. You had Phil testifying to that. And you had Pattie testifying to that.

Then they would have you believe all three of them lied. And then she saw through the broken window. She saw the man come along in the white suit. Well, that's what bakers wear, are white suits, and she saw him standing next to the truck. And she saw the grey Cadillac right behind him.

Then a few minutes later she saw him across the street, "Was looking, crouching,

turning," I think her testimony was. And then Diane called. You remember little Diane, seventeen years old also at the time. Defendant would have you believe that she was part of this nefarious scheme to frame him.

And little Diane called and they had a conversation, as young girls do, and Pat said, "There's been a man outside. There goes his car."

Diane, who lives around the corner, said, "Oh, I see him, too."

And she saw him a couple of times cruising around. Both of them saw him. Delivering bagels, cruising around like that?

So Diane and Pat corroborate each other. They both saw the greay Cadillac. And then Pat says to Diane, "I see him by the truck. There's a flash, a flame."

Diane is still on the phone. Then he hopped off, according to Pat, got in his car and drove off.

Ladies and gentlemen, this is the way it happened. This is the way it happened. There was nobody in that store with Pat when

she was having that conference with Diane. She saw it and she was scared when she saw that. She told Diane that. Called the cops. Patrolman Ward came down with his partner, John Brower. They extinguished the fire. The description of the man was given to them: Middle aged, spreckled hair, white spreckled hair, white suit, driving a grey Cadillac.

There wasn't much traffic that night, as Patrolman Ward testified to, and as Pattie Guze testified to. Suddenly the Caddy re-appeared, coming from the right to the left. Pattie spotted it and the cops spotted it.

Once again, honest differences of opinion or recollection. Pattie says she yelled to the cop -- excuse me, Patrolman Ward testified that he didn't recall her saying anything. But be that as it may, Patrolman Ward went off with his partner and they found the defendant a few blocks away.

Patti says when he came back, she identified him as being the man.

She sat in this courtroom, ladies and

gentlemen, and said, I'll never forget him. Because when you're scared, you remember a face. She said, "I'll never forget him."

She saw him do it, ladies and gentlemen. She saw the defendant put the torch to that car, that truck. And Patrolman Ward, it didn't take him twenty minutes to get there when he answered the alarm. It took about seven, as I recall he testified to. And then when he went out to get the defendant, when he stopped him, the defendant said he was going home.

Now, if you recall, Pattie said defendant took a -- veered sharply right. Now, if you look at this arrow, ladies and gentlemen, this arrow is the direction which Pat Guse said the defendant went, this way. He was heading up toward the Clearview Park Golf Course, about 1:30 in the morning. And yet he told the officer he was going home. And you recall, of course, where his place of business is, down here at Flushing.

It's a very unusual way to go home, ladies and gentlemen. Perhaps he had his golf

clubs in the car. He was going to get an early start the next morning and play a little golf.

Now, Fireman Regan also testified. The defendant would have you believe that he testified that once the fire started, it could only last a minute or two. That's incorrect, ladies and gentlemen. Fire Marshal Regan testified he was unable to determine because he didn't know how much paper was stuffed in there. He didn't know what was in there. He did testify that the explosive power of that truck with ten gallons of gasoline was ninety sticks of dynamite.

Now, ladies and gentlemen, testimony came before you from the Government witnesses the past four or five days, depicts a very tragical vignette, depict the disallusionment of some young men who worked and slaved long hours to building a business, their own business, only eventually they came face to face with a competitor who they just couldn't cope with, a man who used violence and terror, a man who stooped so far as to blow up a truck,

knowing full well that young Stephan Sterman would arrive there somewheres around that time to make his deliveries.

He had no regard for what would happen to Mr. Stephan Sterman, if he got too close to the truck before it went up.

They were dealing with a man who they had taken some accounts from in a free competitive industry. And they said, Darryl Steinberg, "Building a business isn't worth getting somebody killed."

Now, the defendant would have you believe that they were going out of business anyway. Anyway. Anyway, ladies and gentlemen.

There's one man in the courtroom right now who didn't think they were going out of business and he was going to take appropriate measures to get his Waldbaum accounts then and now or then and there, and that's Mr. Benjamin Schwartzberg. He didn't think they were going out. And he went down there and he put that torch to that truck.

Sometimes, ladies and gentlemen, actions

speak a lot louder than words and this particular case actions of the defendant speak for themselves. rather than some of the words that you heard from the lips of some of the witnesses for the defendant.

Let's look at some of the defendant's witnesses, Mr. Schumach, big to-do, five thousand dollars, they still owe me. He didn't even know whether or not Phil Reicher was doing business with them still, and he is. But he had a clear recollection of going to court to collect that $800. It has no bearing.

Mr. Schumach isn't down there on the street, so what he owes him, five thousand dollars, a corporation owes him five thousand dollars.

Mr. Gadman, Thompson Bagel Manufacturer, Thompson Equipment Company, an expert. Been working six years, Plainview, Long Island. Travels all over the country. He admitted he wasn't an accountant and he admitted he wasn't an expert in financial affairs. But he's an expert. He can pass on the credit and financing of all these little companies. He also supplied

Ben Schwartzberg, by the way. He has a business relationship with Ben Schwartzberg. He didn't see fit to do business with them, according to his testimony. He didn't see fit to sell equipment to 21-44. But a local company, wise in the ways of the business in this hightly concentrated bagel industry here, they sold him equipment on a four-year lease, a four-year payout. They had confidence in him.

Ladies and gentlemen, Mr. Gadman's testimony is pure conjecture. He's no expert. He doesn't know. What? He didn't know. And he also denied, ladies and gentlemen, he didn't recall having conversations with Mr. Reicher and Mr. Steinberg, Darryl Steinberg, after that. But he had a clear recollection of that one or two meetings. He, his testimony can be disregarded completely.

Mr. Levy, remember him. He was impeached. You can forget about Mr. Levy. His testimony was, he used to come to the store a couple of hours a day. He testified the company, bad shape financially. He would come

to the store a couple of hours a day and waited around for a call, a call to get a job, an electrician.

He testified that the company was in bad shape.

Ladies and gentlemen, if the ship is sinking, you start manning the pumps, and he wasn't doing much. He was sitting around waiting for a call. The ship wasn't sinking and he knew it. Sure, they had financial problems, but they weren't sinking. They were torpedoed and he knew when they got torpedoed and he knew all about it, because when I refreshed his recollection from his Grand Jury testimony, he said, "We were all nervous and we just prayed it wouldn't happen again."

And he also testified on direct that he had never heard of the reputation of the defendant or the characterization as "Benny the Torch," "Benny the Bomber." No conversations he said on direct examination.

Upon being read his Grand Jury testimony in which at that time he said the defendant had a very bad reputation, that he knew his method

of operation. He then said, "Yes, I now remember, but I forgot that when I testified on direct."

He didn't know exactly when he forgot. But some time between the time he had testified before the Grand Jury and the time he testified here yesterday, he had forgot to know all about that. The only thing he remembered was the bad financial shape.

So in effect, ladies and gentlemen, his Grand Jury testimony corroborates the witnesses of the Government, Mr. Reicher, Mr. Steinberg.

We'll never know, ladies and gentlemen, unless we're prophets or have the gift of reading minds. You'll never know why Mr. Levy testified that way on direct examination.

Reputation. You heard the Government witnesses testified as to what they knew of the defendant's reputation and how it instilled fear in them. Mr. Schumach, the vice-president sitting up in his office, and Mr. Gadman, the expert who travels all over the country. They never heard of it.

Well, they are suppliers, ladies and gentlemen. They are not down there making the bagels and selling them. They supply Ben Schwartzberg. They don't want to know about anything.

Did you see, ladies and gentlemen, any competitors of Benjamin Schwartzberg come forward and put the lie to the witnesses of the Government? Do you see any bialy or bagel manufacturers come forward and say, "No, I've never heard of that reputation. Those young people are telling a lie. I've never heard of it, and I've been in business for twenty years."

Did you hear one person? Any speck of testimony from a competitor of Mr. Schwartzberg's? Did you see, did you hear testimony from Martin Schwartzberg? He's a competitor. He's in the bialy business. Where was he? Where was he to testify and to put the lie to Mr. Steinberg and Mr. Reicher and Patti and Diane and Mr. Fisher? Think about that, ladies and gentlemen.

With regard to Mr. Ted Schwartzberg,

his testimony, he's his son and he testified. The son will testify on behalf of his father. It's a very noble thing.

Now, let's look at some more facts. The Waldbaum accounts. Here they are, all the records for the year 1970, with the checks, the amounts paid to Star of David for the accounts. Checks to 21-44. They are all here for your perusal, ladies and gentlemen, and if you look at them, you'll see that in early July there were five stores in Queens that stopped being on the list of stores going to Mr. Schartzberg, and they were put on the list of stores Mr. Reicher and his company had.

Those stores were number 41, number 43 -- excuse me, number 45, 48, 53, and 91.

If you examine these records, ladies and gentlemen, you'll notice for about two and a half weeks Benjamin Schwartzberg wasn't servicing those five stores in Queens.

Then if you examine further, you will see, lo and behold, Benjamin Schwartzberg is now serving them again.

If you look at these documents, you will see that the five stores averaged between two and three hundred dollars a week in business, to Philip Reicher and his company or to anybody who had those stores. You multiply that by fifty-two, for a young growing company. That's a nice piece of business.

And you remember Morris Pitt testifying. He called Mr. Schwartzberg and said, "I'm giving the stores to Mr. Reicher and his company."

And you recall Mr. Morris Pitt testifying that later Mr. Reicher called him, "No more stores." And Mr. Pitt at that point called Mr. Schwartzberg, and Mr. Schwartzberg had them back.

And, of course, ladies and gentlemen, these documents which I showed you yesterday as to the sales of flour, the purchases of flour, they are here for your inspection, by 21-44.

Now, Mr. Reicher testified, in sum, he knew of the reputation of Mr. Schwartzberg, and he knew what to expect, but he wasn't going

to be pushed around and he went out and he solicited those Waldbaum accounts. They were growing, he was growing, his company was growing. Sure, they had financial problems once in a while, but they were growing. They were young hard-working guys, fourteen, twelve hours a day. And he got those Waldbaum accounts and then, on July 10th, Mr. Schwartzberg came down to the store and this is uncontradicted testimony, ladies and gentlemen, Phil Reicher said, "Ben, I'm sorry, I'm sorry I took your accounts, but business is business."

And Ben said, "This is your last gasp, kid," and Phil knew. He knew who he was talking to. He was talking to "Benny the Torch." He knew that. And later that day he had a conversation with Darryl, with Ricky Fisher, and with Eugene Steinberg. And Darryl said, "Give him back, give him back." But not Phil. He's going to stay in there fighting. He wasn't going to give them back.

I think Darryl testified that Phil said, "This is a free country and I'm going to

keep them."

The same day he saw Phil, also saw Mr. Sterman. You remember Steve. And Steve inquired of him, "Is that the union delegate?" after he had seen Mr. Schwartzberg.

And Phil said, "No, that's Ben Schwartzberg."

Steve Sterman, of course, you recall was the young man who had a number of conversations with Mr. Schwartzberg in the night previous to July 10th, quite early in the morning, about 1 o'clock or so, in which Mr. Schwartzberg asked him, "If you'd like to join the union."

Very strange, ladies and gentlemen, for a competitor to be lurking around somebody's store trying to get a driver to join the union. What would that mean? If they got this driver into the union, perhaps a strike? Perhaps labor problems? Perhaps some sort of disruption in this little company that was fighting for its life and to grow and get bigger and bigger.

And then Mr. Reicher also testified

about the windows and the bialys, they stopped serving him bialys. They had to make their own bialys, and then finally they got the bialys back, somebody started serving them again.

That was around the 15th or 16th. Darryl Steinberg testified to that.

And after that, then the truck. Phil Reicher testified that when the truck went, he tried for a little bit, and he realized that to try to compete with the man who would resort to what Mr. Schwartzberg resorted to, it's not worth it.

As Darryl said, "It's not worth somebody getting killed."

And they just gave it up. Pack it in. Give back the stores. "Let's get out of this whole business. We don't want to be in a business where we have to keep looking in the hoods, of gas tanks, and have guards outside watching our property. Let's give it all to him and get out."

Darryl Steinberg, young Darryl, he was the night man. He was warned before he

even went into the business. He was warned, "Don't take any accounts." He was warned by a driver of Mr. Schwartzberg, "Don't take any accounts. I don't want to see anybody get hurt."

Darryl knew his reputation. And then when they got the accounts in late June when Darryl found out about it,he had a conversation with a man named Steven Saperstein, who told him, "Watch out; put the locks on the gas tanks. Do this. Do that. Check the ovens."

Darryl was scared, and he told his father, "Let's give them back. We're playing with fire."

How right he was. They were playing with fire.

Then he had a conversation with Ted Schwartzberg, and Ted said, "My father wasn't born yesterday. He knows how to take care of people."

He told Phil and Pop again, his father, "Give them back."

The windows, he saw the windows and then he had a little private incident, his

tires were punctured every night or on a number of nights during that summer in July, and he lived right around the corner from Mr. Schwartzberg's place of business.

And then he went to Jersey one day in July and he remembers that day because he had to pick up deliveries of Ardex-550, and he came back and he had a conversation with Phil again, and Phil told him, "Ben was just here a while ago and said this is your last gasp."

And Darryl said, "Somebody is going to get killed. Give them back."

Not Phil. It took a little more to convince him. He said no, he didn't want to quit yet. And then, according to Darryl, who corroborates Phil, they had the problem with the bialys, couldn't make them and then eventually, on the night of the 16th, early morning of the 17th, the truck, that little bagel truck, step-van, with a name so proudly printed on it and they even had number 21. They had great hopes. They had hoped to maybe have 21 trucks like this some day, and Darryl

comes back after this incident, after he has delivered his bagels, he comes back, he hears about it and he tells his father, "It's not worth it. Somebody is going to get killed."

After that, the next few days, conversations. Finally, Darryl and his father prevail and they got out. He gave them back.

Darryl testified that he wasn't going to get out and solicit customers. He didn't know what was going to happen. They couldn't expand. They couldn't do anything.

Ricky Fisher. Ricky Fisher testified that he worked there that summer, he heard of the reputation. He was -- excuse me, involved in the conversation with Phil and Darryl on July 10th when Phil related, "This is your last gasp" which had been told to him by Ben.

Ricky was very upset. Once then, shortly thereafter, he went in and he wouldn't light the oven. He thought he saw something in there. Finally, he got so nervous he left, couldn't work any more, took a vacation. He wasn't going to wait around. He wasn't going

to wait around for the big blow-up, or whatever it was going to be.

Now, ladies and gentlemen, the pattern is there in a nutshell. The Waldbaum accounts are taken. Then he's threatened on July 10, Phil Reicher, corroborated by three witnesses. Windows broken, flat tires, an attempt to unionize, and the bialys, no bialys. If they don't have bialys, they can't service Waldbaums. But they finally got the bialy service back. So, about a day or so later, the truck, the torch was put to the truck. All the Levys and all the vice-presidents and all the young national sales managers in the world can stand up there and testify, ladies and gentlemen. But they can't change the fact that these events happened. They can't change the fact that that truck was put on fire, and they can't change the fact there was a seventeen year old girl inside that building. And they can't change the fact that if that truck had gone off, who knows how many people would have been hurt or killed.

And all the testimony of the Steven Levys

and vice-presidents in charge of sales and the young expert from Plainview, Long Island, despite all that, they can't change the fact that Mr. Schwartzberg initiated a series of events, initiated a reign of terror against these young, hard-working people.

All they were trying to do was to compete.

He wanted those Waldbaum accounts back, ladies and gentlemen, and he got them back. What an awful way to do it.

Now, ladies and gentlemen, I appreciate your time and the very kind attention you have given me, both me and Mr. Kestnbaum in the past week. Thank you very much.

THE COURT: Any motions you gentlemen wish to make before I give the charge to the jury?

MR. SHANLEY: No, your Honor.

MR. KESTNBAUM: I have no motions.

THE COURT: Thank you.

(Whereupon, the Court then charged the jury as follows:)

THE COURT: Now, ladies and gentlemen, I am going to tell you what the law is.

You will be the sole deciders of the facts, but I want you to follow my instructions on the law.

If during the trial a question was asked and an objection was interposed which I sustained, you are to disregard the question. And if an answer was stricken, you are to disregard the matter that was stricken from the record.

My own views are not reflected at all in any of the rulings that I made. I have no view at all with respect to the guilt or innocence of this defendant.

My rulings were based on procedural rules that are of no concern to you.

The fact that the prosecution was brought in the name of the United States, does not entitle the prosecutor to any greater consideration than would be given to any other litigant in this court.

We treat all litigants equally. Nobody is entitled to sympathy. Nobody is entitled to any favor.

As I told you, an accusation by indictment

is merely a way of bringing the case into court. It's not entitled to any weight at all in your deliberations.

This defendant has pleaded not guilty. And the Government, therefore, has the burden of proving guilt beyond a reasonable doubt with respect to each element of the crime that he is accused of committing.

A defendantdoes not have to prove his innocence. A defendant doesn't have to submit any evidence at all. On the contrary, he is presumed to be innocent, and the fact that the defendant didn't take the stand, under the law, creates no inference against him.

The defendant in a criminal case need not take the witness stand.

The burden of proof, beyond a reasonable doubt, lies with the Government right throughout the trial and throughout your deliberations.

A reasonable doubt means a doubt which is sufficient to cause a prudent person to hesitate to act in the most important affairs of his life.

Finding a citizen to be guilty of a serious crime is quite important, and you will consider the importance of this matter in determining whether or not you have a reasonable doubt.

Now, if you are convinced beyond a reasonable doubt of the defendant's guilt, then you should find him guilty and not be swayed by sympathy.

The law does not require certainty, because only those who are actually present can feel any degree of certainty, and none of us, of course, was present at the event in question.

So, in evaluating all the information you have before you, you are going to have to rely very considerably on your individual experience and background and knowledge of how people act and think.

The indictment, and that's the charge reads as follows:

"At all times hereinafter mentioned, 21-44 Food Corporation, located at 21-44 Utopia Parkway, Whitestone, Queens, within this district, and incorporated under the laws of the State of

New York, operated a business through its corporate officers and, in the operation of the business, the corporation ordered and purchased ingredients such as flour, salt, malt and yeast for the manufacture of bagels, which ingredients moved in interstate commerce in various locations in the State of New Jersey as well as from various locations in the states of these United States to the Eastern District of New York, from on or about the 10th day of July, 1970 and on or about the 1st day of August, 1970, the exact dates being unknown to the Grand Jury.

"Within this district, the defendant, Benjamin Schwartzberg, did unlawfully obstruct, delay, and affect commerce, as that term is defined in Section 1951 of Title 18, United States Code, and the movement of articles and commodities in such commerce, by extortion, as that term is defined in the same statute; that is to say, the defendant, Benjamin Schwartzberg, obtained property rights and including the right to conduct a business from the 21-44 Food Corporation by the wrongful use of actual and threatened

force, violence and fear against the 21-44 Food Corporation, its officers, employees and customers."

Now, the statute which is entitled "Interference with Commerce by threat or violence" reads as follows:

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section, shall be guilty of an offense against the United States."

The term "extortion" under the law means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear or under color of official right.

And the term "commerce" means all commerce between any point in the state and any point outside of the state.

In order to establish the offense

charged, the Government must prove beyond a reasonable doubt three essential elements:

First, that the defendant induced his victim to part with property.

Second, that he did so by extortion.

And, third, that in doing so, interstate commerce was adversely affected.

Now, the first element is that the defendant, Benjamin Schwartzberg, induced the 21-44 Food Corporation to part with property.

The property may include such intangible items as the right to conduct a business.

The property involved in this case are the Waldbaum accounts which 21-44 Food Corporation had obtained from Waldbaum. Those are the accounts previously serviced by the defendant. You can find that property having a value under the statute, because they are valuable to or were valuable to 21-44 Food Corporation.

If you find beyond a reasonable doubt that the defendant caused the 21-44 Food Corporation to give up its right to service a Waldbaum account, then this element of the offense would

be satisfied.

The second required element is that the defendant must have induced his victims to part with their property by means of extortion. I've already read that definition to you. But I'll read it to you again.

"The term 'extortion' means the obtaining of property from another with his consent induced by wrongful use of actual or threatened force, violence or fear."

So to find the defendant guilty of this offense, you must find that he obtained property from his victims by means of his wrongful use of actual or threatened force, violence, or fear; that is, if you find that he attempted to burn the truck or blow up the truck or did other acts of violence or said things in the light of the state of mind of the owners of the corporation that were designed to cause them to be fearful or to believe that violence would be threatened, then you could find that that almost was satisfied.

Third and final element which you must determine, that the Government has proved beyond

a reasonable doubt, is that in carrying out his extortion, defendant delayed, interrupted, or adversely affected interstate commerce in any way or degree -- even to a minimal degree. You may find the presence of such interstate commerce in the movement of bagel ingredients such as flour and salt and yeast from other states to 21-44 Food Corporation in New York, if youfind that such movement has been proven beyond a reasonable doubt.

You don't have to prove any major disruption or adverse effect and the interstate commerce does not have to be reduced. It's enough if it is shifted from one supplier to another or from one purchaser to another.

Thus, if flour were going from New Jersey to 21-44 Food Corporation in New York in order to service Waldbaum accounts and, as a result of extortion, it went to the defendant or another bagel bakery, then commerce would be adversely affected.

It doesn't seem to me there is any serious question about the fact that 21-44's closing reduced interstate commerce or affected

it within the meaning of the statute. So that the critical issue is whether defendant's acts and fear of him, beyond a reasonable doubt, caused the closing -- at the time of the closing in July -- and whether the defendant did certain acts, primarily the alleged setting of the fire to the truck.

Again, the three elements are: That the defendant, Benjamin Schwartzberg, regained the business of sellingbagels and bialys to one or more of the Waldbaum stores from the 21-44 Corporation.

Second, that he obtained this business by the use of actual or threatened force, violence, or fear.

And, third, that by his actions, affected shipments of any ingredients of bagels from outside the State of New York to 21-44 Food Corporation.

Obviously an important aspect of your duties here is to determine the credibility of the various witnesses and to decide how much weight should be given to what they say.

In weighing testimony of a witness, you

may consider the relationship of the witness to the Government or to the defendant, his bias or interest in the outcome of the case, his or her manner while testifying, the intelligence or candor of the witness as you observed it, the extent to which the testimony has been corroborated or contradicted by other credible evidence and inconsistencies within the testimony, and whether the testimony was changed during the course of the examination or from the time of the Grand Jury statements to now.

Inconsistencies or discrepancies in a witness, in a witness's testimony or between the testimony of different witnesses may or may not cause you to discredit the witness and the testimony, because two or more persons witnessing an accident or a transaction may see or hear it differently or may recollect differently with respect to it.

Failure of recollection on details is not an uncommon experience, but you have to decide whether in view of the importance of the matters here and the circumstances,

discrepancies should lead you to disbelieve a witness.

In weighing the effect of a discrepancy, consider whether the discrepancy resulted from an innocent error or intentional falsehood. After making your judgment on that matter, you then will have to give each witness's testimony or any part thereof such weight as you may think it deserves, bearing in mind that a witness may be mistaken or even may testify falsely as to part of what he says and may be testifying truthfully to other parts.

If you believe a witness has willfully sworn falsely with respect to part of his or her testimony, you are entitled to disregard his or her testimony in whole or in part. But, as I explained to you, this is a matter for you to choosing and deciding what witnesses and what part of the witness's testimony you should believe.

You are entitled to your own opinion, but you should exchange views with your fellow jurors and listen carefully to each other. While you should not hesitate to change your

opinion, if you are convinced that your original assessment was wrong, remember the decision should be your own ultimately.

Any verdict must be unanimous. Your oath sums up your duty and, that is, without fear or favor to any person, you will well and truly try the issues before these parties according to the evidence given to you in court and according to the laws of the United States as I have just explained them to you.

Now, gentlemen, if you will come on the side bar, in case I have misspoken or left out anything, I would appreciate it.

(The foregoing side-bar conference out of the hearing of the jury ensued:)

MR. KESTNBAUM: I have no exceptions.

MR. SHANLEY: No exceptions, your Honor.

(Whereupon, the side-bar conference then concluded.)

THE COURT: All right. I will now, with the consent of counsel, release the alternate jurors. Thank you very much, gentlemen. You won't be needed. Please do

not discuss this case with each other or anybody else until the verdict comes in. Is that clear? Would you report downstairs, please, and get further instructions. Thank you.

(Whereupon, the alternate jurors were excused.)

THE COURT: Now, will the marshals come forward, please. I'd like you to hear the marshal sworn so you understand their function in this matter.

(The marshal was sworn by the Clerk of the court.)

THE COURT: Now, we do have a stenographic record. It has not been reduced to typing. If you want any specific testimony read back, the foreman will send the note in with the marshal. But bear in mind that it's difficult to read this material back, it's difficult to obtain it. So if you can keep those requests to a minimum, I would appreciate it so we don't have to try and read back all the testimony. And if you can be very specific about what you want, that will be helpful to

us. If you want any or all of the exhibits, send in a note and we'll be pleased to send them in to you.

The clerk will provide you with pencils and paper and if you want anything else, give the marshal a note and we will attempt to get it before you.

You may now retire and consider your verdict. Thank you.

(Whereupon, the jury then retired to deliberate on a verdict.)

THE COURT: All right. Gentlemen, would you mind, please, stacking all of your exhibits actually in evidence on the table, the side table some place, so that in case they call for them, we can send them in as quickly as possible.

(Whereupon, at 4:40 p.m. a note was sent out by the jury.)

THE CLERK: Juror's note marked as Court Exhibit 4. After no objections by counsel, the note reads, "Could we have the street maps?"

If there are no objections by counsel, the map is to go in, it is to be given to the

marshals and taken in by the marshals.

MR. SHANLEY: Let the record show that counsel and I agree that this is the street map.

MR. KESTNBAUM: That is correct.

(Whereupon, the jury continued to deliberate, and at 5 o'clock p.m. the following occurred, in the absence of the jury:)

THE COURT: Sit down. The marshal wants to know what we should do with the jury. I usually don't like to hold them in this neighborhood. At what time will it get dark now?

THE MARSHAL: Now around 6:30.

THE COURT: I usually like to let them go before dark. But we can hold them later, but then we have the problem of whether to bring them in tomorrow or whether to keep them overnight in a hotel.

What's the view of the defendant?

MR. KESTNBAUM: I would leave it to your Honor's discretion. I have no set view on it.

THE COURT: What's the Government's

view?

MR. SHANLEY: I'll join with the defendant in that, your Honor.

MR. KESTNBAUM: Your Honor has solved all the problems we have had so far.

THE COURT: The others I can solve because it's a matter of law. Well, I think what I'll do is bring them in at 6 o'clock and ask them what they would like to do because they may be very close to a verdict then, in which case it's senseless to send them home. They may want to send out for sandwiches or something. Why don't we do it that way. If they don't come in, I'll hold them not beyond 9 o'clock and then I'll bring them in tomorrow. So you will have to provide for that contingency, although I think they will come in.

MR. KESTNBAUM: I think there's going to be a verdict.

MR. SHANLEY: It's Friday afternoon.

THE COURT: I'd rather not bring them in tomorrow. I don't think it's a good idea to let it go over the weekend, too many things can happen.

(Whereupon, at 6 o'clock p.m. a note was sent out by the jury.)

THE CLERK: Jurors' note marked as Court's Exhibit 5.

THE COURT: Bring in the jury, please.

(The jury entered the courtroom.)

THE COURT: It's a little after 6, ladies and gentlemen. We have a number of alternatives:

You can continue sitting, in which case the marshal will take whatever messages you wihs transmitted and transmit them to your homes or whoever you would like to transmit them to.

Or we can leave shortly with or without messages and come in tomorrow, or we can continue deliberating into the evening, if you are going out to dinner or having dinner sent in.

Would you consider what you would like to do and let me know, depending on how close you are to a decision, you ought to make a decision yourself. But we will proceed with the case tomorrow if you like or this evening,

whichever you prefer. Would you retire and let me know what your pleasure is.

(Whereupon, the jury withdrew from the courtroom.)

(Whereupon, at 6:15 p.m. the following occurred:)

THE COURT: The Clerk will mark this note saying "We are planning to deliberate."

I'm sending in a message that says you may send out messages to be delivered by the telephone and/or orders for coffee or a light snack.

Any objection from counsel?

MR. KESTNBAUM: No, your Honor.

MR. SHANLEY: No, your Honor.

THE COURT: Please mark it as a Court exhibit and hand it to the marshal to be delivered to the jurors.

THE CLERK: Note marked as Court's Exhibit No. 6.

(So marked.)

(Whereupon, at 6:50 p.m. the following occurred:)

THE CLERK: Jurors' notes for

telephone calls marked as Court's Exhibit No. 7.

(So marked.)

(Whereupon, at 8 o'clock p.m. the following occurred:)

THE COURT: Did you mark the note?

THE CLERK: No. Jury note marked as Court's Exhibit 8.

(So marked.)

THE COURT: Bring in the jury.

(The jury entered the courtroom.)

THE COURT: Now, Mr. Foreman, I understand that you have reached a verdict?

JURY FOREMAN: Yes, we have.

THE COURT: Mr. Clerk, would you take the verdict, please.

THE CLERK: Mr. Foreman, ladies and gentlemen of the jury, how do you find the defendant, guilty or not guilty?

JURY FOREMAN: Guilty.

THE CLERK: Mr. Foreman, ladies and gentlemen of the jury, as the Court has received your verdict, you say you find the defendant guilty and so say you all.

THE COURT: Poll the jury, please.

THE CLERK: You have heard the verdict as the Court has received it. Now, Juror No. 1, is that your verdict, yes or no?

JUROR NO. 1: Yes.

(Whereupon, all the jurors were polled by the Clerk of the court, and the verdict was unanimously affirmed.)

THE CLERK: So say you all.

THE COURT: Gentlemen, is there any reason why the jury should not now be discharged?

MR. KESTNBAUM: There is no reason that I have, yoru Honor.

THE COURT: Ladies and gentlemen, you are now discharged. Thank you for your assistance. Would you report, please, at 9:30 on Tuesday morning in the jury room.

Will any of you need assistance in getting home? Do you want a marshal to accompany you to the station? All right. Will the marshal arrange with the jurors so they are accompanied to a suitable place.

THE MARSHAL: Yes, your Honor.

THE COURT: The marshal will arrange

it with you in the jury room. Thank you, ladies and gentlemen.

(Whereupon, the jury was discharged.)

MR. KESTNBAUM: Your Honor, may I reserve all motions until the date of sentence?

THE COURT: Well, I suppose there's no reason why you shouldn't if you are going to make motions that require a good deal of thought.

MR. KESTNBAUM: I ask that bail be continued.

THE COURT: Any objection?

MR. SHANLEY: No objection, your Honor.

THE COURT: Bail is continued. One of the conditions is that the defendant stay away from all witnesses and members of their family. Is that clear, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: I suppose the defendant ought to come in Monday so we can begin the probation report. If you inform him and have the probation report begun Monday morning, it will take about seven or eight weeks to finish a probation report and we'll get in touch with

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

- against - :

71 CR 500

BENJAMIN SCHWARTZBERG, :

Defendant. :

- x

United States Courthouse
Brooklyn, New York
January 18, 1974
10:45 o'clock A.M.

B E F O R E:

HONORABLE JACK B. WEINSTEIN, U. S. D. J.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

EMMANUEL KAST
Official Court Reporter
U.S. District Court

OFFICAL COURT REPORTER

APPEARANCES:

EDWARD J. BOYD, V, ESQ.
United States Attorney for the
Eastern District of New York

BY: RICHARD L. SHANLEY, ESQ.

NATHAN KESTNBAUM, ESQ.
Attorney for Defendant.

* * * * *

THE CLERK: United States of America versus Benjamin Schwartzberg, for sentence.

MR. KESTNBAUM: Good morning.

My name is Nathan Kestnbaum, 51 East 42nd Street,appearing for the defendant.

MR. SHANLEY: Richard L. Shanley. Good morning, gentlemen.

MR. KESTNBAUM: Your Honor, I reserve my motion to set aside the verdict, as you may recall.

I move to set it aside on this ground:

Conceding that reputation evidence is admissable in this case, for the sake of argument, I think the prosecutor went far beyond that, and where the issues were closely contested I don't think they had a right to show that the defendant was involved in breaking glasses and throwing rocks. I think the evidence that similar rocks were in the area where he lived was entirely out of order.

THE COURT: What did we do with those rocks from his area?

DidI let that in?

MR. SHANLEY: As a rule, your Honor, as a rule, your Honor, you would let it in, it was testified to; however I think you directed the Jury not to, after we were not able to show there was connection, a direct

connection with the rocks and the defendant, I think you directed the Jury to disregard the testimony.

THE COURT: I don't have a clear recollection and I don't have the record before me.

MR. KESTNBAUM: Then there was much talk about the slashing of tires on the part of the defendant, there was even testimony that an objective --

THE COURT: I don't recall any testimony like that.

MR. SHANLEY: No, your Honor, the testimony was by the witness Darrel Steinberg that his tires had been punctured, and you allowed that in.

He testified about over a dozen times through the summer of 1970, during the period --

THE COURT: Yes, this case involved a very serious question whether they were closing up because they were in fear, or they were closing up because of some financial reverses, and I allow a fair degree of freedom because of the way the issue was posed on the state of mind of the main witness.

It was a difficult case but I thought your client was protected by my instructions.

I do not have the record before me now and it is not being presided, so it is very difficult to intelligently pass on these questions.

MR. KESTNBAUM: There was just one other matter, your Honor, that was with relation to what one of the witnesses, I think it was Darrel Steinberg, said, what he thought was a bomb --

THE DEFENDANT SCHWARTZBERG: Richie Fischer.

MR. KESTNBAUM: Yes, Richie Fischer.

I think the cumulative affect of these matters which did not deal with reputation or anything along those lines but rather tended to show positive acts on the part of the defendant, they will have tipped the scales against him.

THE COURT: Well, I understand that this is a difficult problem. The cases go in a variety of ways. The specific fact situation and the rulings of the Court on the specific evidence become critical.

I must say, without myself being critical of you, I find it is strange that having been given all of this time I am now presented with a difficult motion without a brief or an affidavit or a supporting document.

Have you asked the reporter for a transcript?

MR. KESNBAUM: I didn't order a transcript, your Honor.

THE COURT: Well, I must, with all due respect, in view of the report indicating Mr. Schwartzberg's

physical condition say that I find this so strange that it concerns my position which I would have asserted in any event that the defendant was fully protected and there is no basis whatsoever for this motion.

The motion is denied.

MR. KESTNBAUM: Alright.

Your Honor, may I see the probation report?

THE COURT: Of course.

I have a confidential memorandum on top of this pro ation report.

If I am not going to show it to defense counsel then I am not going to use it.

What is the position of the probation office?

THE PROBATION OFFICER: Your Honor --

THE COURT: You may consult with the United States Attorney if you would like to.

THE PROBATION OFFICER: Yes, I think I should.

THE COURT: Show it to him and consult with him.

I'm going to give counsel the rest of the probation report plus the very substantial number of letters thatI have received on the defendant's behalf.

They will be marked as a Court's exhibit.

Please.

THE CLERK: Court's Exhibit 1.

THE COURT: See if you can staple all of these

exhibits together or else put a rubber band around them.

Hold that, would you, please.

THE PROBATION OFFICER: Your HOnor, since I am unaware of the what the usual procedure is in this matter, I don't think he should see it and you can disregard it.

THE COURT: Alright.

I will not regard that.

Mark it, however, so in case the Court of Appeals wishes for some reason to look at it, it will be available.

Mark this as Court's Exhibit 2.

THE CLERK: Court's Exhibit 2.

THE COURT: Please seal it.

It will not be kept in my chambers.

I have, however, Ishould like to say for the record, looked at it because I did not know what was in it when it came to me, that I have forgotten most of it except to recall that was enough in it that I thought the defendant should see it so he may use it.

So I will ignore what I remember.

It will be in the Clerk's Office if it is needed for Appeal.

We will take a short recess while you examine

the documents.

Okay.

(A recess was taken in the Schwartzberg matter, and then it continued as follows:)

THE COURT: Gentlemen: I will hear you now.

MR. KESTNBAUM: Your Honor, I have read the pre-sentence report, and of course, it is carefully prepared.

I have known the defendant and members of his family for about fifteen years.

There is one thing that has impressed me personally about the defendant, he has always been scrupulously careful to pay his obligations. I don't think he owes money in this world, outside of the mortgage on his home and an official bank loan.

He has been in the bialy-bagel business for twenty years, and no one questions but that he has been a hard-working family man while in that business.

During the trial, some of the people whom he did business with and who testified against him, I believe this was one of the manager's of Waldbaum's, he testified to his decency as a business man.

He is fifty-eight years old, has a case of diabetes, and I noted the medical report of his doctor that he has an angina heart disease, and he has reached

the stage of his career as to his state of health, your Honor, where time is a very valuable and precious thing.

There is one thing that is not contained in the report:

His son Teddy has been under extreme pressure and just the other day he had a bleeding from his eye which may cause a partial or total blindness in one eye, and it is very likely that he will be unable to continue the business.

This case was hotly contested, your Honor. There were physical aspects of it which to this day cause me to doubt the validity of the charges against him, on its face, even though I will concede that they were finally decided against him.

Under all the facts and circumstances, your Honor, I urge that you exercise every possible clemency on behalf of the defendant.

THE COURT: Does the defendant have anything he wishes to say?

THE DEFENDANT SCHWARTZBERG: I would like to say something, your Honor, but could I -- well it seems like an informal sentencing, I would prefer to speak after the United States Attorney speaks.

THE COURT: Is there anything you want to say?

MR. SHANLEY: Your Honor, I think theevidence that came out at the trial shows a premediated crime of a very severe nature and the government feels that the punishment of this crime should be commensurate, and I feel incarceration is required, not required but would be, would be an apt punishment in this case, a substantial incarceration.

THE COURT: Does the Probation Officer have anything to say?

THE PROBATION OFFICER: No, your Honor.

THE COURT: I will hear you now, Mr. Schwartzberg.

Do you wish to read your statement?

THE DEFENDANT SCHWARTZBERG: Yes, I would.

THE COURT: By all means.

THE DEFENDANT SCHWARTZBERG: Your Honor, while waiting the continuance of my trial, I witnessed numerous sentencing by your Honor. I saw that most all defendants had the closest kin speak in their behalf. I chose to have my wife and children not to appear here.

I saw the plaintiff and many witnesses swear to speak to the truth and nothing but the truth, and then sit down and immediately wipe their imaginary fingerprints from the Bible and commit outright perjury.

I'm sure your Honor was aware of theinconsistencies in the testimony presented against me.

I am merely a statistic to the ambitious head of the Organized Crime and Task Force of this Eastern District.

Were I an ordinary citizen seen without previous criminal record, this case would have remained under the jurisdiction of the state. Mr. Shanley bore me out when in summation he said, "Sure, they are going out of businessbut Benjamin Schwartzberg did not know that when he set the truck on fire," and therefore the United State Government admitted thatI did not put them out of business, but they indicted me for the same which in my opinion, to use an old cliche is to make a federal case out of it.

Your Honor, you have my criminal record before you and to avoid being repetitious I explained same in my letter to you which you have gracefully acknowledged receiving.

If twenty-two years of conducting myself in a lawful manner does not constitute rehabilitation, then I say probation and parole is hypocritical and its use is only to alleviate crowded prisons. but the sentence always remains.

I ask your Honor to meditate:

Why did the Government wait more than three years to bring me to trial?

We were always ready, I never requested an adjournment.

I, knowing the facts, was positive I would never be brought to trial but when I heard all the lies and I knew the government's witnesses, with two exceptions, Mr. Morris Pitt and the Fire Marshal, were coached and corrupted, I went to people who could have exposed these lies and who could have testified for me but they couldn't because they couldn't remember what happened three years ago.

I couldn't go to these people after I was indicted because how was I to know that the government was going to introduce false testimony of the kind that was beyond my realization.

I respectfully request thatyour Honor dismiss the complaint or in the alternative to order a new trial.

Thank you for the opportunity to speak before your Honor.

THE COURT: All sentencing is very difficult and this case presents some of the most puzzling difficulties I have had.

I never had a case where there have been such

an outpouring of letters on behalf of a defendant, except one or two, and these letters seem to indicate that thedefendant has been a very responsible and credible businessman for the last twenty years. I have read the very interesting letter of thedefendant himself explaining how he got into the business.

On the other hand when we consider thetestimony that we have had in the case, and there is a prior serious record although there is the indication of rehabilitation within the last some years, and based on the conviction record the last conviction was in 1952 --

THE DEFENDANT SCHWARTZBERG: '51, your Honor.

THE COURT: It says here 4/23/52, when you were 36, when you were sentenced.

Now the crime is a very serious one. The Jury, after what I consider to be a fair trial and in a difficult case found the defendant guilty.

I don't know whether you are guilty or not, it is not my role in this --

THE DEFENDANT SCHWARTZBERG: I understand that, your Honor.

THE COURT (Continuing): In this procedure.

I assume that the jury was right, I have to.

If there are any errors in the trial, the Court

of Appeals can correct them.

Onthe basis of what I have heard, I haven't been convinced that there are any errors, if I were, I would grant a new trial.

But it seems to me you did get as fair a trial as was possible to get under these circumstances.

The judges met and discussed it, the sentences proposed varied from ten years, three years, eight years.

In view of the age and the health of the defendant, however, I think such a long prison term would be unrealistic.

Under a split sentence the longest term I can give would be six months.

It does seem to me that a split sentence is what is called for, so I am sentencing the defendant to ten years, to serve six months, with a $10,000 fine.

Any questions?

MR. KESTNBAUM: No, your Honor, may I, may I move at this time that bail be continued.

There will be a prompt appeal here.

THE COURT: Yes.

One condition of the sentence is that you cut off your connections with the Union except that you deal with the Union as an employer.

I don't want you running two sides of the fence.

Part of the testimony seemed to me to indicate that you operated as a unionizer as well.

DEFENDANT SCHWARTZBERG: Well, your Honor, since I wasn't permitted to take the stand, --

THE COURT: You were permitted by the Court, you mean you chose not to take the stand.

DEFENDANT SCHWARTBERG: I chose not to take the stand, it wasn't explained to your Honor, to the Court, why I had met with that particular party, I believe his name was Steimer, I mean that was the only time that I did act for the Union on the Union's request.

THE COURT: I don't want you doing it anymore, I don't want you acting for the Union, you just run your own business, and that is all, because there can be no violence at all, if there is any it will be a violation of the probation.

THE DEFENDANT SCHWARTZBERG: I understand that your Honor.

THE COURT: You can go to jail for ten years, and I am serious about the ten year term; if you slip at all you are in for the whole ten years.

Is that clear?

THE DEFENDANT SCHWARTZBERG: Yes.

THE COURT: Anything further?

MR. KESTNBAUM: Nothing further.

THE COURT: Anything from the Government?

MR. SHANLEY: No, your Honor.

MR. KESTNBAUM: Thank you.

MR. SHANLEY: Bail will be continued?

THE COURT: Bail continued.

See if you can expedite the appeal.

MR. KESTNBAUM: I will, your Honor.

THE COURT: You had better order the transcript otherwise you can't expedite anything.

I understand, Mr. Schwartzber, you are entitled to take an appeal, and if you cannot afford a lawyer the court will appoint one for you.

THE DEFENDANT SCHWARTZBERG: I understand that.

THE COURT: Do you have any questions?

THE DEFENDANT SCHWARTZBERG: No, sir.

THE COURT: Thank you, gentlemen.

THE DEFENDANT SCHWARTZBERG: Thank you.

MR. KESTNBAUM: Thank you.

THE COURT: I also don't want you to divest yourself of assets so you cannot pay the fine during this period.

MR. KESTNBAUM: There won't be anything like that, I can assure you of that.

THE COURT: Alright.

MR. KESTNBAUM: Thank you, your Honor.

* * * * *

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25th day of June, 1974 at No. deponent served the within appellant Appendix upon U.S. Attorney Southern Dist. of N.Y. the Appendix in One herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me,
this 25 day of June 1974.

Edward Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975